(6)

No. 98-437-CFH Title: Arthur Calderon, Warden, Petitioner
v.
CAPITAL CASE Russell Coleman

Docketed: Court: United States Court of Appeals for
September 14, 1998 the Ninth Circuit

Entry	Date	Proceedings and Orders
	Sep 14 1998	Petition for writ of certiorari filed. (Response due October 14, 1998)
	Sep 14 1998	Appendix of petitioner filed.
	Oct 14 1998	Brief of respondent Russell Coleman in opposition filed.
	Oct 14 1998	Motion of respondent for leave to proceed in forma pauperis filed.
	Oct 28 1998	DISTRIBUTED. November 13, 1998
	Nov 17 1998	Record requested.
	Nov 18 1998	Record filed.
	Nov 20 1998	REDISTRIBUTED. November 25, 1998
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	Dec 7 1998	REDISTRIBUTED. December 11, 1998
	Dec 14 1998	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Dec 14 1998	Petition GRANTED. Judgment REVERSED and case REMANDED Dissenting opinion by Justice Stevens, with whom Justice Souter, Justice Ginsburg and Justice Breyer join. Opinion per curiam. (Detached opinion.)

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No. 97-437 SEP 14 1998

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, California State Prison at San Quentin, *Petitioner*,

v.

RUSSELL COLEMAN, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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(CAPITAL CASE)

QUESTIONS PRESENTED

1. Does an ambiguous jury instruction, which a federal habeas court finds to be misleading under the test of *Boyde v. California*, 494 U.S. 370 (1990), command automatic reversal of a state judgment without application of the harmless error test of *Brecht v. Abrahamson*, 507 U.S. 619 (1993)?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

No.

ARTHUR CALDERON, Warden, California State Prison at San Quentin, *Petitioner*,

v.

RUSSELL COLEMAN, *Respondent*.

Arthur Calderon, Warden, California State Prison at San Quentin, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION OR JUDGMENT BELOW

The opinion of the Court of Appeals, App. A, is reported at __F.3d__, 1998 WL 420240 (9th Cir. 1998). The order of the District Court granting relief from the sentence of death but denying relief from the conviction is unreported. App. B.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on July 28, 1998. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

28 U.S.C. § 2254(a) provides:

> "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

STATEMENT OF THE CASE

Respondent, Russell Coleman (hereafter Coleman), was convicted and sentenced to death for the rape, sodomy, and murder of Shirley Hill on September 5, 1979. Her body was found in a prefabricated bungalow used for storage at a high school in San Francisco. She was naked from the waist down. Her killer had strangled her with her pants. RT 305, 315.[1] Coleman's finger and palm prints were found on either side of the body. RT 345-48, 404.

On autopsy, vaginal material was removed for analysis. Forensic testing confirmed the presence of recently deposited semen. Using genetic markers, the

1. "RT" refers to the state trial Reporter's Transcripts which were part of the record below.

prosecution's serologist established that only 8 percent of the population, which included Coleman, could have supplied the semen. RT 511.

When arrested, Coleman lied to the police and denied ever being present at the murder scene. His story changed when he took the stand at trial. RT 562-63. He testified he had been in the bungalow a few days before the murder.

Following the jury's determination of guilt and finding of special circumstances, the prosecution presented documentary evidence at the penalty trial that, between 1970 and 1973, Coleman was convicted of three burglaries and one count of sale of heroin. Also produced was testimony relating to Coleman's 1977 conviction of false imprisonment and possession of a dagger; a January 1980 conviction for molesting an 11-year old child; and another January 1980 conviction for rape and oral copulation of a 13-year old girl. RT 828-31, 936-37.

In addition, the prosecution introduced testimony relating to eight separate incidents of violence while Coleman was imprisoned or incarcerated awaiting trial. "The evidence showed defendant stabbed an inmate-trustee twice in the back; assaulted deputies attempting to obtain a hair sample, pursuant to court order; reached through cell bars and grabbed a woman staff person, making a lewd suggestion; hit an inmate-trustee in the mouth; threw milk at a prison staff person and fought with deputies trying to move him; and struck another inmate waiting in a food line, breaking the other inmate's jaw." *People v. Coleman*, 46 Cal.3d 749, 762 n. 5, 759 P.2d 1260, 251 Cal.Rptr. 83 (1988).

The thrust of the prosecution closing argument in the penalty case rested on Coleman's institutional

history of violence and his likely future danger in prison if not executed. RT 1017-23. Death was the only appropriate penalty, given Coleman's "choice[] not to coexist in this society of County jails or State prisons." RT 1029. According to the prosecutor, a jury selection of the penalty of life without possibility of parole would imperil the lives of other prisoners and prison personnel. "By giving Mr. Coleman life imprisonment without the benefit of parole, what you are doing, and the evidence supports this, you are signing the death warrant, and you are sentencing unknown individuals, other inmates, other correctional officers and other people who have anything to do with the State prison system, you are sentencing them to death." *Id.* The prosecutor concluded that, without a sentence of death, Coleman's next potential victims were "those individuals that have made a career of work in State institutions, be they correctional officers, be they nurses, be they teachers. . . ." RT 1030.

Before deliberating on the issue of penalty, the jury received, among other instructions, a modification of the so-called "Briggs Instruction," alerting it to the Governor's power to commute a prison sentence of life without possibility of parole. The modification directed the jurors not to consider the Governor's commutation power in determining the punishment.

The instruction did not include information applicable to Coleman that, in situations where a prisoner was a twice-convicted felon, the Governor had to consult with the Board of Prison Terms and obtain the approval of four justices of the state supreme court before commuting a sentence. *See* Cal. Const. Art. V, § 8; Cal. Penal Code, §§ 4802, 4813. Because of the omission, the instruction was later deemed inaccurate and led to reversal of the death judgment in federal court. *See* App. A at p. 28-33.

As given, the instruction read:

> You are instructed that under the State Constitution, a Governor is empowered to grant a reprieve, pardon or commutation of a sentence following conviction of the crime.
>
> Under this power, a Governor may in the future commute or modify a sentence of life imprisonment without the possibility of parole to a lesser sentence that would include the possibility of parole.
>
> So that you will have no misunderstandings relating to a sentence of life without possibility of parole, you have been informed generally as to the Governor's commutation modification power. You are now instructed, however, that the matter of a Governor's commutation power is not to be considered by you in determining the punishment for this defendant.
>
> You may not speculate as to if or when a Governor would commute the sentence to a lesser one which includes the possibility of parole.
>
> I instruct you again that you are to consider only those aggravating and mitigating factors which I have already read to you in determining which punishment shall be imposed on this defendant.

RT 1059-60, 1065-66.

The jury returned a verdict of death. RT 1073.

The California Supreme Court affirmed the judgment. *People v. Coleman*, 46 Cal.3d 749.[2] This Court denied a petition for writ of certiorari. *Coleman v. California*, 489 U.S. 1100 (1989). Petitioner arrived in the district court under 28 U.S.C. § 2254 in 1989. After five amended petitions and a three-week evidentiary hearing, the District Court issued an order on March 25, 1997, granting petitioner relief from his sentence of death on the basis of the commutation instruction, which the District Court found inaccurate and misleading. The District Court otherwise denied relief from the convictions. App. B.

The parties cross-appealed. On July 28, 1998, a Ninth Circuit panel affirmed the judgment, granting relief only as to the penalty. App. A. In reaching its penalty decision, the panel relied on the circuit precedent of *Hamilton v. Vasquez*, 17 F.3d 1149 (9th Cir.), *cert. denied*, 512 U.S. 1220 (1994), which found that the omissions in the challenged commutation instruction created an inaccuracy that rose to constitutional error.[3] App. A at 29-31.

After finding error, however, the Ninth Circuit panel declined to apply the harmless error test of *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), which requires reversal of a state judgment on federal collateral attack only on a showing that the error had a "substantial and

2. Petitioner also filed habeas corpus petitions in 1990 and 1994 in the California Supreme Court which that court denied.

3. The Ninth Circuit has followed *Hamilton* in two other capital cases reversing death judgments because of "inaccurate" commutation instructions: *McLain v. Calderon*, 134 F.3d 1383 (9th Cir. 1998) (modified Briggs instruction) (pet. for cert. filed June 1, 1998); and *Gallego v. McDaniel*, 124 F.3d 1065 (9th Cir. 1997), *cert. denied*, 118 S.Ct. 2299 (1998), and *cert. denied*, 118 S.Ct. 3211 (1998).

injurious effect or influence" on the jury's sentence of death. The panel, again relying on circuit precedent, looked instead solely to *Boyde v. California*, 494 U.S. 370 (1990). App. A at 33 (*citing McDowell v. Calderon*, 130 F.3d 833, 838 (9th Cir. 1997) (en banc), *cert. denied*, 118 S.Ct. 1575 (1998)). The appellate panel determined that the instructional error warranted reversal without further discussion because: "When the inaccuracy undermines the jury's understanding of sentencing options, 'there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.' *Boyde*, 494 U.S. at 380." App. A at 33. The Court of Appeals made no finding that the instructional error, which it found prevented the jury from considering the relevant role in the commutation process of state supreme court justices and the Board of Prison Terms, had a substantial and injurious effect or influence on the jury's sentence in the context of the entire trial record.[4]

REASONS FOR GRANTING THE WRIT

The Ninth Circuit has announced an unauthorized rule automatically reversing a state judgment for trial error. Gone is the restraint of *Brecht v. Abrahamson*, 507 U.S. 619, guarding the principles of

4. California argued below that the instruction was not "inaccurate" but merely an incomplete statement of state post-sentencing law, and that at the time the judgment in this case became final (1988), it was the state alone which decided how much of that law, if any, was appropriate to the jury's sentencing choice. *See O'Dell v. Netherland*, 521 U.S. 151, 117 S.Ct 1969, 1977 (1997) (before decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994), "states retained the prerogative to determine how much (if at all) juries would be informed about the postsentencing legal regime").

finality, comity, and federalism by barring a federal habeas court from overturning a state judgment on collateral attack without a showing of "'actual prejudice.'" *Id.* at 635, 637.

As it stands, Ninth Circuit law automatically reverses a state judgment if an *ambiguous* instruction was reasonably likely to mislead the jury from considering constitutionally relevant evidence, regardless whether the jury's consideration of the evidence would have made a difference in the result. Now, no matter whether a misleading instruction affects evidence that is important or trivial, or a question that is significant or marginal, the state judgment falls without concern about substance or injury. That rule directly conflicts with the decisional law of this Court, undermines established principles of federal habeas review, and affects all cases under 28 U.S.C. § 2254, both capital and non-capital, in which trial error from an ambiguous instruction would not otherwise support reversal under the *Brecht* test. Given the uncertainty which the Ninth Circuit's decision has generated on the question whether *Brecht* harmless error analysis applies in such cases, this Court should provide clear guidance to the courts.

ARGUMENT

THE NINTH CIRCUIT'S RULE OF AUTOMATIC REVERSAL FOR AN AMBIGUOUS INSTRUCTION THAT A JURY IS REASONABLY LIKELY TO HAVE MISAPPLIED CONFLICTS WITH THE REQUIREMENT OF HARMLESS ERROR ANALYSIS UNDER *BRECHT v. ABRAHAMSON*, 607 U.S. 619 (1993)

No state judgment clouded by an ambiguous instruction that a jury is reasonably likely to misapply on an issue, however insubstantial, survives under the Ninth Circuit's aberrant rule of automatic reversal. The rule disregards this Court's jurisprudence and cannot coexist with the principles of harmless error on which habeas corpus review under 28 U.S.C. § 2254 rests. Adopting the test of *Kotteakos v. United States*, 328 U.S. 750, 776 (1946), this Court has unequivocally limited habeas relief in cases of trial error to those errors which "had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, at 623; *see also California v. Roy*, 519 U.S. 2, 117 S.Ct. 337, 338-39 (1997) (per curiam) (applying *Brecht* in habeas attack on error in omission of element of offense). In fact, this Court has applied the test of *Brecht* to cases, similar to the one at issue here, which assumed an "instruction (taken together with prosecutor's statement) had indeed violated the Federal Constitution *by misleading* the jury." *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995) (emphasis added).

This Court has also repeatedly found harmless error review applicable to *unambiguous errors* causing the exclusion of relevant mitigating evidence or the admission of improper aggravating evidence in capital penalty phases. *See Satterwhite v. Texas*, 486 U.S. 249, 258 (1988)

(harmless error available to review admission of psychiatric evidence at sentencing of a capital case in violation of Sixth Amendment); *Clemmons v. Mississippi*, 494 U.S. 738, 752 (1990) (use of constitutionally invalid sentencing factor subject to harmless error review under state law); *Singletary v. Duest*, 507 U.S. 1048 (1993) (vacating judgment and remanding to Eleventh Circuit to review prejudice under *Brecht* from use of defendant's vacated prior criminal conviction in penalty phase); *Singletary v. Smith*, 507 U.S. 1048 (1993) (vacating judgment and remanding to Eleventh Circuit to review prejudice under *Brecht* from preclusion of mitigating evidence in penalty phase); *cf. Tuggle v. Netherland*, 516 U.S. 10, 13-14 (1995 (per curiam) (case remanded to state court to determine whether harmless error review applicable to error under *Ake v. Oklahoma* which precluded capital defendant from adducing relevant psychiatric mitigation evidence and increased persuasiveness of state's aggravation case by preventing defendant from challenging it).

In the case at bench, there was not even an unconstitutional exclusion or admission of penalty phase evidence. The Ninth Circuit found only that the challenged commutation instruction "*potentially* diverted the jury's attention from the mitigation evidence presented," App. A at 29 (emphasis added), by dramatically overstating the "possibility of commuting" Coleman's life sentence, *id.* at 31. In doing so, the error invited the jury to "speculate" about whether Coleman could effectively be isolated from the community only by a sentence of death, thereby minimizing the "viability of all sentencing options other than death and prevent[ing] the jury from deliberating with the guided discretion required by the Eighth Amendment." *Id.*[5]

5. Notwithstanding the Ninth Circuit's observation about the Eighth Amendment, this Court has stated: "[A]s long as the mitigating evidence is within 'the effective reach of the sentencer,' the requirements of the Eighth Amendment are satisfied." *Johnson v. Texas*, 509 U.S. 350, 368 (1993). The question whether inaccurate penalty phase information about commutation violates the Eighth Amendment is raised in California's pending petition for writ of certiorari in *McLain v. Calderon*, No. 97-1940, filed June 1, 1998. Because we did not raise below the issue identified in *McLain*, we do not raise it here. However, if the *McLain* petition is resolved favorably to the state, it will undo the Ninth Circuit's decision in this case. On the other hand, if the question presented by *McLain* is not resolved by this Court, or resolved unfavorably to the state, the issue presented here will continue to need decision.

It is not apparent why an instructional error of this kind is any less reviewable for prejudice than other penalty phase error to which this Court has expressly directed lower courts to apply *Brecht*. For example, in the face of the *actual* unconstitutional exclusion of relevant mitigation evidence, *Brecht* applies. *See Singletary v. Smith*, 507 U.S. 1048 (vacating and remanding for reconsideration in light of *Brecht* the opinion in *Smith v. Singletary*, 970 F.2d 766 (11th Cir. 1992), granting habeas corpus relief on the basis of *Chapman*-based finding of prejudice from error preventing the defense presentation and jury consideration of mitigating evidence).[6] Plainly, the actual exclusion of mitigating evidence is no less likely to minimize the "viability" of "sentencing options" and to misguide the jury's exercise of discretion under the Eighth Amendment than an "inaccurate" instruction which, even in the Ninth Circuit's view, has only the "potential[]" to do

6. Similarly, this Court has also remanded for *Brecht* review the question whether prejudice flowed from the *actual* admission of unconstitutional aggravating evidence in a capital case. *See Singletary v. Duest*, 507 U.S. 1048 (vacating and remanding for reconsideration in light of *Brecht* the opinion in *Duest v. Singletary*, 967 F.2d 472, 480-82 (11th Cir. 1992), granting habeas corpus relief on the basis of *Chapman*-based finding of prejudice from erroneous jury consideration of vacated prior conviction).

so. App. A at 29. If, in the face of unambiguous penalty error, this Court has required application of *Brecht* to determine whether the error resulted in actual prejudice, the rule can be no different for "ambiguous" error.

The Ninth Circuit assumed, as a matter of law, the worst effect from the challenged commutation instruction. It did so without engaging in any review of "the error in the context of the entire trial record," *Brecht*, at 641, to determine whether the challenged instruction prevented the jury from considering relevant evidence that would raise a "grave doubt" about the error's substantial and injurious effect on the verdict. *See O'Neal v. McAninch*, 513 U.S. at 435. The Ninth Circuit's presumption of prejudice was therefore untroubled by the trial context of the error. Had the appellate panel looked to the record, it would have seen that the prosecutor in this case made no reference to the commutation instruction, which the jury was instructed not to consider, RT 1059-60, 1064-65, and that the jury took less than three hours to deliberate before returning its death verdict. RT 1058, 1073. During the penalty phase of trial, the issue of life or death was never connected to the possibility that petitioner would leave prison. The question before the jury was what to do with an incorrigibly violent man who was a ticking bomb for the prison system. The specter haunting the jury was not, therefore, petitioner's possible release from prison but his actual imprisonment for life.

This Court's decision in *Boyde v. California* does not stand for the proposition that a habeas court can ignore the actual effect of trial error on the jury's verdict. *Boyde,* which was decided three years before *Brecht*, clarified only the relevant standard by which a reviewing court could determine whether a jury erroneously interpreted an ambiguous instruction. *Boyde*, at 380; *see*

also Estelle v. McGuire, 502 U.S. 62, 73 n. 4 (1991). The question of harmless error was not before the Court.

The Ninth Circuit's mistake is that, without analysis, it conflates the *Boyde* test for *error* with the *Brecht* test for *prejudice*. App. A at 33, *citing McDowell v. Calderon*, 130 F.3d at 838 (error under *Boyde* "necessarily satisfies the *Brecht* test for substantial and injurious error"). The assumption that there can be no *Boyde* error without *Brecht* prejudice finds no basis in this Court's jurisprudence. *Boyde* does not present the overlap of error and prejudice discussed in *Kyles v. Whitley*, 514 U.S. 419 (1995), dealing with *Brady/Bagley* error (prosecution failure to disclose material, exculpatory evidence). In *Kyles*, this Court noted that a "*Bagley* error could not be treated as harmless, since a 'reasonable probability that, had the evidence been disclosed to the defense, *the result of the proceeding would have been different*,' necessarily entails the conclusion that the suppression must have had 'substantial and injurious effect or influence in determining the jury's verdict[.]'" *Kyles*, 514 U.S. at 435 (citations and interior quotation marks omitted; emphasis added).

In contrast, the *Boyde* test makes no reference to the effect of error on the jury's verdict or the trial result. As framed and reaffirmed by this Court in *Estelle v. McGuire,* the *Boyde* standard requires only that, in reviewing an ambiguous instruction, "we inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." 502 U.S. at 72. Obviously, not every violation of the Constitution requires reversal. And unless a constitutional error is structural in nature, this Court requires a federal habeas court to apply the *Brecht*

harmless error test. *California v. Roy*, 117 S.Ct. at 338-39.[7]

To subsume *Brecht* within *Boyde* is therefore to swing a wrecking ball through the structure of harmless error analysis in every case in which, for example, a jury considers inadmissible evidence because of an ambiguous instruction. That issue arose in *Estelle v. McGuire*, 502 U.S. at 74, in connection with possible jury consideration of inadmissible propensity evidence. Using the *Boyde* test, this Court found no "reasonable likelihood" that the jury understood that it could consider such evidence, and therefore found no constitutional error. *Id.* But if this Court had concluded otherwise, application of the Ninth Circuit's misunderstanding of the effect of simple trial error in the admission of propensity evidence would have required automatic reversal. That result would be insupportable, and a Ninth Circuit rule compelling it would defeat harmless error analysis under *Brecht* whenever an ambiguous instruction is reasonably likely to mislead the jury on any issue, large *or* small.

The precedential effect of this extraordinary Ninth Circuit rule on habeas cases is at best unsettling, and potentially devastating to any state criminal judgment

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7. "Trial error" as opposed to "structural error," is subject to harmless error analysis. The latter applies to error infecting the entire trial process, or affecting the framework within which the trial proceeds, rather than simply to an error in the trial process itself. *See Arizona v. Fulminante*, 499 U.S. 279, 310 (1991); *Brecht v. Abrahamson*, 507 U.S. at 629. Nothing in the panel decision suggests that the Court of Appeals viewed the challenged instruction at issue here as anything more than trial error.

uncorrupted by actual prejudice from an instructional error. This Court adopted the *Brecht* standard to be consistent with the limited and secondary role of federal habeas corpus. *Brecht*, at 633. The role of habeas as a bulwark against violations of "fundamental fairness" and as a means of protecting the "grievously wronged," *see id.* at 633-34, cannot survive a method of reviewing constitutional error which is unconnected to *actual prejudice*. *See id.* at 637. This Court should intervene in this case to restore that limited role and reconfirm that trial error requires reversal only in the face of an error's substantial and injurious effect on the verdict.

CONCLUSION

For the reasons stated above, certiorari should be granted.

Dated: September 11, 1998.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Russell Coleman,

Petitioner-Appellant-
Cross-Appellee,

v.

Arthur Calderon, Warden,

Respondent-Appellee-
Cross-Appellant.

Nos. 97-99013
97-99014

D.C. No.
CV-89-01906 RMW

OPINION

Appeals from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Argued and Submitted
May 20, 1998—San Francisco, California

Filed July 28, 1998

Before: Mary M. Schroeder, Melvin Brunetti and
David R. Thompson, Circuit Judges.

Opinion by Judge Thompson

SUMMARY

CRIMINAL LAW AND PROCEDURE/CAPITAL CASES

The court of appeals affirmed a judgment of the district court. The curt held that in the penalty phase of a state prosecution for capital murder, the defendant's constitutional rights are violated by a commutation jury instruction incorrectly stating that the governor acting alone has authority to release the defendant on parole.

In a California capital murder prosecution, a jury convicted appellant/cross-appellee Russell Coleman of first-degree murder with special circumstances that made him eligible for the death penalty. In the penalty phase, the trial court instructed the jury that if they did not sentence Coleman to death and sentenced him to life in prison without the possibility Coleman's sentence to life with the possibility parole.

The instruction was incorrect in that it failed to state that to exercise the commutation power for an offender with multiple felony convictions like Coleman, the Governor had to consult with the State Board of Prison Terms and obtain the approval of four justices of the California Supreme Court.

The jury returned a verdict of death. coleman exhausted his state postconviction remedies and sought federal habeas corpus relief.

The district court denied relief from the conviction, but granted Coleman's petition as to his sentence on the ground that the trial court's commutation instruction violated *Hamilton v. Vasquez*, 17 F.3d 1149 (9th cir. 1994).

Hamilton held that a commutation instruction is unconstitutional when it is inaccurate regarding sentencing options. The commutation instruction in this case as materially indistinguishable from the instruction held unconstitutional in *Hamilton*; the State of California conceded as much in its certiorari petition in *Hamilton*. Both sides appealed.

[1] The state trial court committed constitutional error in instructing the jury on the power of the Governor of California to commute Coleman's sentence to life imprisonment with the possibility of parole. **[2]** This instruction gave the jury inaccurate information about the Governor's commutation power and potentially diverted the jury's attention from the mitigation evidence.

[3] A commutation instruction is unconstitutional when it is inaccurate. This rule relies on the Supreme Court's emphasis on the importance of accuracy in the description of sentencing alternatives in a death penalty proceeding. **[4]** The instruction in this case was inaccurate. Because Coleman had numerous felony convictions, the Governor alone did not have the power to commute a sentence of life imprisonment without the possibility of parole to a sentence of life imprisonment with the possibility of parole.

[5] The value of an accurate commutation instruction is its ability to clarify for the jury the meaning of long terms such as "life without the possibility of parole." When the court misinforms the jurors about the nature of one sentencing option, the jurors no longer understand the choice they are asked to make. In this case, the accurately informed the jury that, unless they sentenced Coleman to death, he could be released into the community on the authority of one person, the Governor. This assertion dramatically overstated the possibility of

commuting the life sentence of a person such as Coleman, who had numerous prior felony convictions. The jury was invited to speculate that Coleman could be effectively isolated from the community only through a sentence of death. such an instruction inappropriately minimizes the viability of all sentencing options other than death, and prevents the jury form deliberating with the guided discretion required by the Eighth Amendment.

[6] The information in the commutation instruction was not simply incomplete. It was in accurate as applied to coleman. A commutation instruction is prejudicially inaccurate when it creates the false impression that the Governor, acting alone, can commute a life sentence.

[7] Imposing a constitutional requirement to provide more complete commutation information was not impermissibly retroactive. *Hamilton* does not require any particular information that a state chooses it give be accurate. The instruction in this case was not accurate.

[8] When the inaccuracy undermines the jury's understanding of sentencing options, there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents consideration of constitutionally relevant evidence. [9] The district curt did not err in holding that Coleman was denied due process by the state trial court's inaccurate commutation instruction.

COUNSEL

Cliff Gardner and Robert Derham,Gardner & Derham, San Francisco, California, for the petitioner-appellant.

Morris Beatus, Deputy Attorney General, San Francisco, California, for the respondent-appellee.

OPINION

THOMPSON, Circuit Judge:

Russell Coleman is a California prisoner under sentence of death. He filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court denied relief from the conviction but granted relief from the sentence, because the state court jury instructions violated *Hamilton v. Vasquez*, 17 F.3d 1149 (9th Cir.1994). We have jurisdiction under 28 U.S.C. § 2253. We agree with the district court and we affirm.

FACTS

On September 5, 1979, between 5 p.m. and 9 p.m., Shirley Hill was raped, sodomized and strangled to death inside a small bungalow next to a football field within the grounds of a high school. In 1981, Coleman was tried and convicted of Hill's murder.

Three parts of the evidence against Coleman strongly support his conviction. These consist of fingerprints, serology tests, and a lie.

The police matched Coleman's palm print to a print left on a windowsill in the bungalow. They also matched his thumbprint to a print left on a chair near Hill's body. The thumbprint tested presumptively positive for blood. Hill's fingerprints were also found on the windowsill on either side of Coleman's palm print. It was not possible to determine whether Hill's fingerprints had been laid down at the same time as Coleman's palm print.

The serology evidence was presented through a forensic serologist, Edward Blake. Blake tested Hill's blood and the semen found in her vagina. Based on these

tests, Blake placed Coleman in eight percent of the population that could have deposited the semen in Hill.

The lie occurred when Coleman was questioned by police. He denied ever having been in the bungalow. At trial, however, he changed his story and testified he had been in the bungalow a few days before the murder. This accounted for his palm and thumbprints at the scene of the crime.

The jury found Coleman guilty of first degree murder, with special circumstances of rape and sodomy. In the penalty phase of the trial, the jury returned a verdict of death. The trial court upheld that verdict.

The California Supreme Court rejected Coleman's direct appeal, with two judges dissenting. *People v. Coleman*, 46 Cal.3d 749, 759 P.2d 1260, 251 Cal.Rptr. 83 (1988). Coleman then filed a petition for a writ of habeas corpus in the district court. Over the next several years, he exhausted in state court unexhausted claims included in his initial and various amended petitions which he filed in the district court. When he completed exhausting his claims in state court and amending his petition in federal court, the district court held an evidentiary hearing. In 1997, that court denied Coleman's petition as to his conviction, but granted the petition as to Coleman's death sentence. This appeal followed.

We turn first to the three parts of the evidence that became the centerpiece of Coleman's conviction: the fingerprints, the serology tests, and the lie.

The Fingerprints

Police Inspector Ihle canvassed the crime scene for fingerprints. He found Coleman's thumbprint on the back

side of a chair, along with four unidentifiable smudged fingerprints on the front side of the chair. Because all of these prints appeared slightly discolored, Ihle performed a Hemastix test on them. A Hemastix test is used as a presumptive test to detect blood in urine. The test showed that the discolored material on the chair back was presumptively blood. After the test was completed, there was not enough discolored material left on the chair back for further testing.

The discovery of Coleman's thumbprint, presumptively in blood on the chair back, triggered other police procedures. Standard police practice required a notation on both the latent fingerprint card and on the object where the fingerprint was found. In this case, Ihle wrote the word "bloody" on the chair back to indicate a bloody print had been found, but failed to note "blood" on the latent print card. Ihle, however, told two police inspectors and the original prosecutor about the test results prior to Coleman's preliminary hearing. The police reports failed to mention either the thumbprint on the chair back or the results of the Hemastix test.

Charles Gush, Coleman's initial counsel, was shown the chair back. At the preliminary hearing, Gush asked Ihle if there were any bloody fingerprints. Ihle responded, "No, there were not." Gush left it at that and did not pursue the matter further.

Gush then resigned and the State appointed Public Defender Peter Keane to represent Coleman. Gush did not discuss discovery matters with Keane and did not tell Keane about the bloody print. After the preliminary hearing, the state court ordered the prosecution to produce "all physical evidence" and "all laboratory, technician's and other reports concerning the testing and examination of [the] physical evidence." Notwithstanding

this court order, the prosecution did not produce the chair back or the results of the Hemastix test. Keane did not see the chair back before trial, and he knew nothing of the bloody print or the Hemastix test.

Keane first learned about the bloody print on the first day of trial, when the coroner said the prosecutor had told him about it. Keane first learned of the Hemastix test when Ihle began to testify. Keane moved to strike Ihle's Hemastix testimony. Keane argued there was no proper foundation for the test and that the prosecution had violated the court's discovery order by not disclosing the bloody print evidence or the Hemastix test results. The prosecution responded by arguing that Keane had sufficient notice of the bloody print because that fact was mentioned in a transcribed police interview with Coleman and because the notation "bloody" was on the chair back.

Although Keane had not seen the chair back, he had seen the transcribed police interview. He did not regard the mention of bloody prints in that interview as significant, however, because he believed the police had used the word "bloody" as hyperbole when questioning Coleman to get him to admit that he murdered Hill.

The trial judge allowed Keane to question Ihle on voir dire in the judge's chambers outside the presence of the jury. During that questioning, Ihle explained that he did not know the chemical processes that caused the Hemastix strip to change color. He said he had tried the test on a few other substances (semen, urine and catsup) and had found that only blood caused the strip to change color. Ihle explained that the test would not differentiate between human blood and other types of blood. At Keane's request, during the voir dire examination, Ihle conducted Hemastix tests on two discolored spots on the

front of the chair back; he obtained a negative reaction for blood from both tests.

The trial court determined that Keane had received adequate notice based upon the notation "bloody prints" on the chair back and a report from the Department of Corrections (which made no mention of bloody prints). This was incorrect. Keane had no such notice. The trial court also found the Hemastix test reliable based upon Ihle's three years of experience with it.

Ihle then testified before the jury. He stated that the Hemastix test is a "presumptive test for blood," which does not distinguish human blood from animal blood. He did not, however, explain what it meant to label a test "presumptive." He admitted that he had no knowledge of the chemistry behind the test. (Later that day, forensic serologist Blake described the chemical reaction upon which the test is based.) Ihle also explained that not enough blood was left to conduct further tests.

On cross-examination, Ihle admitted that he had tested only a few items with the Hemastix test: blood, urine, catsup, tomato sauce and coffee. He had not tested sweat, whiskey or coke. Ihle had performed the original test in the presence of a police officer, but no chemist checked the results. He also testified that when he tested the front of the chair back in the judge's chambers, the Hemastix test did not show the presence of blood.

Ihle further testified that he did not know if fingerprint powder would cause the Hemastix strip to react. On redirect, however, he explained that the Hemastix test he had just performed in chambers showed that the Hemastix strip would not react to fingerprint powder.

The subject of the Hemastix test and the bloody print came up again during argument to the jury. In the prosecutor's opening argument, he explained that Ihle did not need to be a chemist to effectively use the Hemastix test. He characterized the Hemastix test as "selective for blood." He explained in detail how Coleman would have gotten blood on his hand if he had put his hand over Hill's mouth to silence her while he was strangling her. He ended his depiction of the crime by stating: "[Coleman] left his calling card in blood."

In Keane's jury argument, he emphasized that Ihle was not a chemist and that the blood might not have been human blood. Then, in the prosecutor's closing argument, the prosecutor returned to the bloody print. He told the jury: "Russell Coleman, Russell Coleman, whose fingerprints we have in blood; Russell Coleman, whose fingerprint in blood is on this chair."

The Serology Tests

The prosecution's expert forensic serologist, Dr. Edward Blake, analyzed Hill's blood, the vaginal wash taken from her body, and Coleman's blood and saliva. He used three different classifications: (1) the ABO blood typing system; (2) secretor status and (3) the phosphoglucomutase ("PGM") enzyme type.

Blake found that Hill was a non-secretor, with type A blood and PGM type 1/1. He also found that the semen donor must have been a non-secretor with PGM type 2/1 or 2/2. Based upon his analysis of Coleman's blood and saliva, Blake concluded that Coleman was a non-secretor with PGM type 2/1 and type O blood. This meant Coleman could have been the source of the semen.

Blake prepared two reports which summarized these conclusions. His reports were furnished to the defense. Blake's laboratory notes, however, were not part of the prosecution's trial file and were not turned over to the defense. Keane gave a copy of Blake's reports to his investigator, Russell Stetler, who interviewed Blake and prepared for Keane a summary of the tests, the results of the tests, and his conversation with Blake.

On October 30, 1980, four days before trial,[1] Stetler delivered copies of Blake's reports to Brian Wraxall, a defense serological consultant. Wraxall did not ask for or receive Blake's notes. Keane consulted with Wraxall to prepare to cross-examine Blake. In total, Wraxall estimates that he spent one hour with the defense team discussing Blake's reports. Although Wraxall was not available to testify, Keane did not consult with any other expert about the serological evidence.

At trial, Blake testified that twenty percent of the population are non-secretors. Forty percent of the population are PGM types 2/1 and 2/2. Only eight percent of the population would have both characteristics (twenty percent times forty percent). Thus, according to Blake, Coleman was included in only eight percent of the male population that could have deposited the semen found in Hill's vagina.

On cross-examination, Keane established that there were other tests Blake could have performed, which might have eliminated Coleman completely. Keane questioned Blake about the peptidase A test, which is useful for

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1. The district court incorrectly stated that Stetler gave Wraxall the reports one month before the trial. Stetler's billing reports and Wraxall's stipulated testimony both show that Stetler gave Wraxall the reports on October 30, 1980. The trial began on November 4, 1980.

typing the semen of African-Americans. Blake had not performed the peptidase A test and said that he should have. Blake explained that he did not perform additional tests, because the number of tests he was able to perform was limited by the small amount of vaginal wash. He performed the tests he believed were most important. Keane also established on cross-examination that Blake had used up all of the vaginal wash, so no more tests could be performed. In addition, Keane got Blake to admit that additional tests might have eliminated Coleman as the semen donor, or substantially decreased the likelihood that he could have been the donor.

The Lie

When Coleman was arrested, he lied and told the police he had never been on the football field or in the nearby bungalow where Hill was murdered. At trial, Coleman changed his story. He testified that the day before the murder, he had jogged on the football field, as was his habit, and then stopped in the bungalow to smoke a joint of marijuana. Coleman explained that he lied to the police, because he knew it was a murder investigation and he felt "scared, paranoid, and nervous."

Coleman supported the story he told at trial with an alibi. He testified that on the day of the murder, he was in college classes from 7:30 a.m. until approximately 3:30 p.m. (Hill was murdered between 5:00 p.m. and 9:00 p.m.) He left school with his friend, Carlton McAllister, and went to his ex-wife Clara Roper's home. McAllister stayed a few hours. Coleman and Roper stayed there until the next morning.

Coleman presented McAllister and Roper as witnesses to corroborate his alibi. McAllister testified that he met Coleman in Cloud Hall at the college at 2:30 or

3:30 p.m. The two of them took the bus to Roper's home, where McAllister stayed with Coleman for two hours. This testimony, however, was undercut somewhat when McAllister stated on cross-examination that he thought he met Coleman on the day of the murder, because that was the first day of classes, but it could have been any day that week.

Roper testified that on the day of the murder (which occurred on the first day of classes) Coleman came to her home with McAllister between 3:30 and 4:00 p.m. Coleman did not leave from the time he arrived until the next morning. On cross-examination, however, Roper testified that, although she had spoken with the police and the district attorney, she had never told them about Coleman being at her home on the day of the murder, because, as Coleman's ex-wife, she did not "want to contribute anything to the case."

Louis Lindsey, a teacher at the college, testified that he taught a class which met from 1:10 to 2:00 p.m. on the day of the murder. Lindsey's attendance records for that day showed that Coleman did not attend the class, but McAllister did. Lindsey marked Coleman's absence "excused," which meant that Coleman came to Lindsey sometime after class (that day or a later day) and requested to be excused.

Coleman retook the stand and explained that he had missed class because of a class conflict, although he could not remember which class caused the conflict

DISCUSSION

I. Standard of Review

We review de novo the district court's decision to grant or deny a petition for a writ of habeas corpus. *Dyer v. Calderon*, 122 F.3d 720, 726 (9th Cir.), *reh'g. granted* (Oct. 9, 1997). We review for clear error the district court's findings of fact underlying its decision to grant or deny relief. *Id*. Because Coleman filed his petition before enactment of the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C.A. § 2261 (Supp.1998), the Act does not apply to this case. *Jeffries v. Wood*, 114 F.3d 1484, 1494 (9th Cir.), *cert. denied*, ___ U.S. ____, 118 S.Ct. 586, 139 L.Ed.2d 423 (1997).

II. Challenges to Coleman's Conviction

Coleman attacks the constitutionality of his conviction by challenging the prosecution's use of the Hemastix test and bloody print evidence. He also argues his counsel was ineffective in responding to this evidence and to the serology evidence, and in not using to his advantage other evidence of a hair fiber found on the victim's hand. Additionally, he contends the police withheld information that they had other suspects. Finally, he contends he was denied due process because the foreman of his jury was a convicted felon and statutorily ineligible under California law to serve on the jury. We consider these challenges in order.

A. Hemastix Test and Bloody Print Evidence

Coleman contends the prosecution's failure to disclose the Hemastix test results and bloody print evidence in advance of trial violated the Due Process and Confrontation Clauses of the Constitution.

1. Due Process Clause

Criminal defendants are constitutionally assured "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). Although due process requires that prosecutors disclose exculpatory evidence, *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), there is no constitutional requirement that defendants in state court proceedings be given notice of inculpatory evidence the prosecution plans to introduce at trial. *Gray v. Netherland*, 518 U.S. 152, 168-170, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996). In *Gray*, the Due Process Clause was not violated even though the prosecution had misled the defense by stating that it would not introduce the evidence it then used at trial. *Id*. at 156-57; *see also Weatherford v. Bursey*, 429 U.S. 545, 559-61, 97 S.Ct. 837, 51 L.Ed.2d 30 (1997) (surprise testimony of undercover agent accomplice did not violate due process even though agent had told defendant and his counsel that he would not testify).

In the present case, Keane was misled because the transcript of the preliminary hearing reflected that Ihle had testified there were no bloody prints found at the crime scene, and because the latent print card did not note that the thumbprint on the back of the chair was bloody. The effect of this, coupled with the prosecution's violation of the discovery order, was that Keane did not learn of the bloody thumbprint or the Hemastix evidence until the time of trial.

The district court assumed without deciding that the prosecution did indeed violate the state court discovery order. We make the same assumption. This violation of state law, however, does not alter the holding of *Gray*. The evidence withheld from the defense was inculpatory evidence, and there is no constitutional requirement that

a state prosecutor provide the defense with inculpatory evidence. *Gray*, 518 U.S. at 168. And, absent some constitutional violation, a violation of state law does not provide a basis for habeas relief. *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

2. Confrontation Clause

Coleman argues that the prosecutor's failure to disclose the results of the Hemastix test, in violation of the state court discovery order, prevented him from having an adequate opportunity to cross-examine the state's witness, Ihle, and this violated the Confrontation Clause of the Sixth Amendment.

The Confrontation Clause prevents restrictions on cross-examination that "effectively ... emasculate the right of cross-examination itself." *Delaware v. Fensterer*, 474 U.S. 15, 19, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985) (quoting *Smith v. Illinois*, 390 U.S. 129, 131, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968)). The Confrontation Clause does not require that the prosecution disclose evidence that would help the defense effectively cross- examine a prosecution witness; the Confrontation Clause is not "a constitutionally compelled rule of pretrial discovery." *Pennsylvania v. Ritchie*, 480 U.S. 39, 52, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987) (plurality opinion) (holding that State did not have to turn over its confidential investigative files). "In short, the Confrontation Clause only guarantees 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *Id.* at 53 (quoting *Fensterer*, 474 U.S. at 20 (emphasis in original)).

In this case, Coleman's right to confront witnesses was not violated. He exercised his right to confront and

cross-examine Ihle at trial. There was no Confrontation Clause violation.

B. Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel, Coleman must first show that "counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). We "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. We conduct an "extremely limited" review of counsel's performance:

> The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial.

Dyer, 122 F.3d at 732 (quoting *White v. Singletary*, 972 F.2d 1218, 1220 (11th Cir.1992)).

These standards apply to the duty to investigate. *Strickland*, 466 U.S. at 690-91. "[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgements." *Id.* at 691.

Coleman must also show that any deficient performance prejudiced the defense. For errors that were committed during the guilt phase, "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695.

Coleman contends that he was denied effective assistance of counsel because his trial counsel, Keane, failed to properly investigate the physical evidence, failed to request a continuance to deal with the Hemastix test results, failed to investigate and deal with the serology evidence, and failed to take advantage of evidence favorable to the defense contained in a laboratory report concerning a hair fragment found on the victim's hand.

1. The Physical Evidence

"The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland,* 466 U.S. at 688. These norms are reflected in American Bar Association ("ABA") standards. *Id*. The ABA standards state that a defense attorney's "investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities." ABA Standards for Criminal Justice, Standard 4- 4.1 (approved 1979); *see also United States v. DeCoster*, 487 F.2d 1197, 1204 (D.C.Cir.1973). In any given case, then, one would expect an attorney to examine the physical evidence, especially in a prosecution involving the death penalty. *Sims v. Livesay*, 970 F.2d 1575, 1580-81 (6th Cir.1992) (counsel ineffective for failing to investigate exculpatory physical evidence for no apparent reason); *see also Sanders v. Ratelle*, 21 F.3d 1446, 1460 (9th Cir.1994) (counsel ineffective, in part, for not familiarizing himself with the physical evidence).

In the present case, however, Keane's performance was not constitutionally deficient. He did not examine the chair back, but he hired an expert who examined the latent print card. There was no notation on the card that the thumbprint on the chair back tested positive for blood, even though standard police practice called for such a notation. Keane also read the transcript of the preliminary

hearing. That transcript revealed that at the preliminary hearing Ihle testified there were no bloody prints. Finally, Keane believed that the police officer's mention of bloody prints during Coleman's questioning was mere hyperbole, because the police were trying to get Coleman to confess.

Perhaps, notwithstanding the foregoing, the best lawyers, or most good lawyers, would have examined the chair back. In the circumstances of this case, however, we are satisfied a reasonable lawyer could have acted as Keane did. His performance was not constitutionally deficient. *See Dyer*, 122 F.3d at 732.

2. Failure to Request a Continuance

Coleman also argues that Keane's performance was deficient because, when the trial court allowed the introduction of the Hemastix test results, Keane, who was surprised by this evidence, did not request a continuance to consult an expert to help him deal with it.

Had Keane obtained a continuance and consulted with an expert, he could have more effectively rebutted the test results. The test, as Ihle performed it, was unreliable because Ihle failed to include positive, negative and substrate controls. More importantly, the Hemastix test reacts positively to such common substances as cleaning agents, bacteria and plant material. *Cf. Clark v. Moran*, 942 F.2d 24, 31 (1st Cir.1991) (effective cross examination of test showed that confirmatory test should have been performed and that the test reacted positively to a detergent that was used in the case). An expert would have helped Keane reinforce these points.

On the other hand, Ihle had testified that the Hemastix test was only a presumptive test. Although he did not explain what it meant for a test to be labelled

"presumptive," he stated that the test did not distinguish between human blood and animal blood. He also admitted he was not a chemist, he did not know the chemical reaction which was responsible for the Hemastix test's results, and he had tested only a few substances for false positives.

Keane assessed the impact of this testimony at the time of trial. The record of the evidentiary hearing in the district court indicates Keane believed that his cross-examination had substantially weakened Ihle's testimony. Keane testified that after he had cross-examined Ihle, he thought Ihle's testimony was "absurd."

Our reading of the record persuades us that Keane's decision not to request a continuance does not indicate ineffective assistance. Instead, it indicates a trial counsel who met the Hemastix evidence as best he could and presented a cross-examination which cast doubt on the test's results. Seeking a continuance to confer with a defense expert, or to put a defense expert on the stand, might have reinforced the evidence. Moreover, the trial court had just ruled that the defense had sufficient notice of the test results, negating Keane's claim of surprise. In the face of this ruling, it is unlikely the trial court would have granted a motion for a continuance even if the motion had been made. *See United States v. Fish,* 34 F.3d 488, 494-95 (7th Cir.1994) (counsel not deficient for failing to make a futile motion for continuance). We conclude Keane did not render ineffective assistance by failing to move for a continuance.

3. Serology Evidence

Coleman contends that Keane was ineffective for failing to adequately investigate and deal with the serology

evidence. Specifically, he argues Keane should have obtained the forensic serologist Blake's laboratory notes, which explained which tests Blake did and how those tests were conducted; and he should have presented his own serology expert as a witness at trial.

As we stated earlier, Keane's investigator gave Brian Wraxall, the defense expert, copies of Blake's reports. Neither Keane nor his investigator obtained Blake's notes. Wraxall testified at the evidentiary hearing in the district court that without those notes he could not give an opinion as to the correctness of the conclusions set forth in Blake's reports. On the other hand, Wraxall believed that he was hired to explain the meaning of the reports, rather than to give an opinion as to their validity. This may explain why Wraxall did not ask Keane or his investigator for Blake's notes.

In any event, in the absence of a specific request, counsel does not have a duty to gather background information which an expert needs. *Hendricks v. Calderon*, 70 F.3d 1032, 1038 (9th Cir.1995). *But see Clabourne v. Lewis*, 64 F.3d 1373, 1384-85 (9th Cir.1995) (deficient performance where counsel consulted expert a few days before expert testified and failed to provide both expert and the state's experts with defendant's mental health records). Part of the skill of an expert is to recognize what information he needs in order to render an opinion. *Hendricks*, 70 F.3d at 1038. "To require an attorney, without interdisciplinary guidance, to provide a psychiatric expert with all information necessary to reach a mental health diagnosis demands that an attorney already be possessed of the skill and knowledge of the expert." *Id.* at 1039. Keane was not required to know what information his serology expert needed.

Additionally, Keane was not required to request an expert opinion from his serology expert. Counsel may consult with an expert to uncover the weaknesses in the state's case; counsel need not hire an expert to give an opinion. *Battle v. Delo*, 64 F.3d 347, 353-54 (8th Cir.1995) (discussing a motion's court ruling concerning serological evidence).

Keane consulted with his expert, Wraxall, to prepare his cross-examination of Blake. That consultation was productive. It enabled Keane to establish that Blake failed to perform certain common tests which might have eliminated Coleman as a suspect. Because the tests Blake performed used up the entire sample, other exculpatory tests could not be performed. Keane was also able to bring out that, based upon Blake's tests, Coleman was one of five million men who could have deposited the semen. Keane's handling of the serology evidence was not constitutionally deficient. *Compare Driscoll v. Delo*, 71 F.3d 701, 708-09 (8th Cir.1995) (deficient performance where counsel merely read a three- page laboratory report, but failed to understand the serological tests performed and to rebut the prosecution's theory that conflicted with the report), *cert. denied sub nom., Bowersox v. Driscoll*, ___ U.S. ____, 117 S.Ct. 273, 136 L.Ed.2d 196 (1996).

4. Hair Report

Coleman contends that Keane was ineffective because he failed to investigate or present to the jury evidence that a one-half inch strand of hair found on the victim Hill's hand was "inconsistent" with Coleman's hair. We agree that this aspect of Keane's performance was deficient, but hold that Coleman suffered no prejudice as a result.

The State's criminologist, Robert Ogle, conducted two separate analyses of hair found at the crime scene. Ogle's

first analysis was included in the report of the prosecution's forensic serologist, Blake. Ogle's analysis showed that hair found in Hill's pubic area could not be distinguished from Hill's own hair. Ogle's second analysis was set forth in a supplemental report. This supplemental report involved a hair fragment found on Hill's hand. That hair fragment, which lacked a root, was presented in a slide which included three cat hairs and some wool fibers. Ogle compared the hair fragment with numerous samples of Coleman's hair. He concluded that the hair fragment was "inconsistent" with Coleman's hair, although he could not "definitely eliminate [ ] [Coleman] as a source of the questioned hair."

The prosecution delivered a copy of Ogle's supplemental report to an investigator working in the Public Defender's office that represented Coleman. Neither Keane nor his co-counsel nor his investigator saw a copy of the report. During Keane's cross-examination of Blake, however, Blake referred to Ogle's supplemental report. Keane asked to see the supplemental report, looked at a copy and said he had never seen it before. The supplemental report was never admitted into evidence.

At the evidentiary hearing in the district court, Keane testified that when he was shown the supplemental report at trial, he thought it was another copy of Blake's earlier report, which discussed the analysis of the pubic hairs. This testimony is at odds with Keane's statement in the trial court that he had never before seen the supplemental report. In any event, Keane never read the supplemental report. If he had read it, he would have learned it contained an analysis of the fragment of hair found on Hill's hand, and that this hair fragment was inconsistent with Coleman's hair.

Given these facts, Keane's performance was constitutionally deficient. He clearly breached his duty to investigate. As the district court stated: "It is unreasonable for counsel in a capital case to ignore a two-page report that was handed to him, at his request, by a prosecution witness he was examining, when he insisted that he had not previously seen the report." *See Baylor v. Estelle*, 94 F.3d 1321, 1323-24 (9th Cir.1996) (ineffective assistance where counsel failed to follow up on a laboratory report that "tend[ed] to eliminate" the defendant as the source of the semen).

To determine if this deficient performance prejudiced Coleman, we must decide whether "there is a reasonable probability that, absent the error[ ], the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695. Had Keane introduced Ogle's report, the jury would have learned that the hair fragment found on Hill's hand was "inconsistent" with it being Coleman's hair. Had Keane consulted an expert, an analysis could have been developed that would have definitely excluded Coleman as a source of the hair fragment.

Coleman argues Keane's deficient performance prejudiced him because the hair fragment, which did not come from Coleman, most likely came from Hill's attacker. We disagree. The floor of the bungalow where Hill was murdered was covered with "debris and dust and dirt." While it is true the hair fragment did not come from Coleman, neither did the cat hairs or wool fibers also found on Hill's hand. The most logical source for all of this debris was the floor.

Moreover, the inconclusive nature of the hair fragment evidence stands in contrast to the probative force of the evidence the prosecution relied upon to establish Coleman's guilt. The jury heard the

uncontroverted evidence that Coleman's palm print was found on a windowsill, bracketed by Hill's fingerprints, and that Coleman's thumbprint was found on a chair next to Hill's body. The serology evidence showed that Coleman was included in eight percent of the population that could have deposited the semen found in Hill's body. Finally, Coleman initially lied to the police when he said he had never been in the bungalow in which Hill was murdered, and he did not change that story until he testified at trial after the prosecution had presented its case.

In sum, there is no reasonable probability that had the supplemental report pertaining to the hair fragment been introduced into evidence, or used by Coleman to present the testimony of an expert witness on behalf of the defense, the jury would have had a reasonable doubt as to Coleman's guilt. Coleman suffered no prejudice within the meaning of *Strickland*.

C. Other Suspects

Coleman contends the State's failure to disclose information about other suspects violated his due process rights under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Under Brady, due process is violated when the prosecution suppresses evidence that is favorable to the defense and material to the issues of guilt or punishment. *Moore v. Illinois*, 408 U.S. 786, 794-95, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972).

The police investigated four other suspects: Hill's current boyfriend; a man who had been bothering Hill and had served time for rape; a man who had committed a rape and kidnapping near the school where Hill was killed; and a former boyfriend who had been following Hill around, and who frightened Hill because he was so violent. The police eliminated these suspects because their

fingerprints did not match the fingerprints found at the crime scene. The police did not check the suspects' blood types, nor did they check the suspects' hair against the hair fragment found on Hill's hand.

The district court found, and the State does not dispute, that the prosecution was aware of these other suspects, but did not disclose this information to Coleman. Nor does the State dispute that information about these other suspects was favorable to Coleman. The success of Coleman's Brady claim depends, therefore, on whether the information about the other suspects was material.

To be material, evidence must be admissible or must lead to admissible evidence. *United States v. Kennedy*, 890 F.2d 1056, 1059 (9th Cir.1989). In order for evidence of another suspect to be admissible, "there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." *People v. Hall*, 41 Cal.3d 826, 833, 718 P.2d 99, 104, 226 Cal.Rptr. 112, 116 (1986). Motive or opportunity is not enough. Id.

In this case, the information about the other suspects consisted of (1) police files on the convicted kidnapper/rapist and (2) police notes of two telephone calls reporting that Hill was bothered by both a violent ex-boyfriend and a convicted rapist. Coleman argues that had he been given this information he could have conducted a timely investigation which might have uncovered witnesses who saw these other suspects bothering Hill or being violent towards her.

What is missing in Coleman's argument is any evidence linking any of these other suspects to the crime, or any showing that disclosure of their existence would have led to the discovery of admissible evidence. This missing link compels the conclusion that the information

about the other suspects was not material. There was no Brady violation.

D. Juror Statutorily Ineligible to Serve

Coleman contends that his right to due process was violated because the foreman of his jury was a convicted felon. In fact, the foreman had been convicted of at least three felonies.[2]

The Sixth Amendment does not bar ex-felons from jury service. *United States v. Boney*, 977 F.2d 624, 633 (D.C.Cir.1992); *see also Coughlin v. Tailhook Ass'n*, 112 F.3d 1052, 1058-59 (9th Cir.1997) (approving *Boney*). Under California law, however, felons may not serve on juries. Cal. Const. Art. VII § 8(b) (West 1996); Cal.Civ.Proc.Code § 203(a)(5) (West Supp.1998) (formerly codified at Cal.Civ.Proc.Code § 199(b)). Coleman contends California law has created a federal due process liberty interest in a jury composed of non-felons, and the state violated this liberty interest. We disagree.

State law may create a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. *Sandin v. Conner*, 515 U.S. 472, 483-84, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995). In order for state law to create a constitutionally protected liberty interest, however, that interest must be of "real substance." Id. at 478 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 557, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974)). A juror disqualification "defect is not fundamental as affecting the substantial rights of the accused, and the verdict is not void for want of power to

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2. The foreman failed to state on the questionnaire sent to prospective jurors that he was a felon. During voir dire, he was not questioned about his prior felony convictions. He later explained that he was unaware that felons could not serve on juries.

render it." *Kohl v. Lehlback*, 160 U.S. 293, 302, 16 S.Ct. 304, 40 L.Ed. 432 (1895) (noncitizen juror in habeas case); *see also Hogue v. Scott*, 874 F.Supp. 1486, 1529 (N.D.Tex.1994) (Texas law that disqualifies felons from jury service did not create a constitutionally protected interest), *aff'd sub nom., Hogue v. Johnson*, 131 F.3d 466 (5th Cir.1997), *cert. denied*, ___ U.S. ____, 118 S.Ct. 1297, 140 L.Ed.2d 334 (1998).

Although California law precludes felons from serving on juries, this does not create a liberty interest protected by the Constitution. The right to a jury of non-felons is not so fundamental that it affects "the substantial rights of the accused. . . ." *Kohl*, 160 U.S. at 302. Accordingly, Coleman was not denied due process because a felon served on his jury, or because that juror was the foreman.

III. Challenges to Coleman's Sentence

[1] Primary among Coleman's challenges to his death sentence is his contention that the state trial judge committed constitutional error in instructing the jury on the power of the governor of California to commute Coleman's sentence to life imprisonment with the possibility of parole. The state trial court instructed the jury:

> You are instructed that under the State Constitution, a governor is empowered to grant a reprieve, pardon or commutation of a sentence following conviction of the crime. Under this power, a governor may in the future commute or modify a sentence of life imprisonment without the possibility of parole to a lesser sentence that would include the possibility of parole. So that you will have no misunderstandings relating to a sentence of life without possibility of parole, you have been informed generally as to the Governor's commutation power.
>
> You are now instructed, however, that the matter of a Governor's commutation power is not to be considered by you in determining the punishment for this defendant. You may not speculate as to, if, or when a governor would commute the sentence to a lesser one which includes the possibility of parole.

[2] The district court correctly held that this instruction as applied to Coleman gave the jury inaccurate information about the governor's commutation power and potentially diverted the jury's attention from the mitigation evidence presented. For that reason, we affirm the district court's grant of the writ as to Coleman's sentence.

[3] A commutation instruction is unconstitutional when it is inaccurate. *Hamilton*, 17 F.3d at 1160 (modified *Briggs* instruction);[3] *see also McLain v. Calderon*, 134 F.3d 1383 (9th Cir.1998) (modified *Briggs* instruction) (petition for cert. filed June 1, 1998); *Gallego v. McDaniel*, 124 F.3d 1065 (9th Cir.1997), *cert. denied*, ___ U.S. ____, 118 S.Ct. 2311, ___ L.Ed.2d ____, 1998 WL 174758, and *cert. denied*, ___ U.S. ____, 118 S.Ct. 2299, ___ L.Ed.2d ____, 1998 WL 99750. This rule relies upon the Supreme Court's emphasis on the importance of accuracy in the description of sentencing alternatives in a death penalty proceeding. *California v. Ramos*, 463 U.S. 992, 1009, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983).

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3. The instruction in this case is materially indistinguishable from the instruction held unconstitutional in Hamilton; the State admitted as much in its Petition for Writ of Certiorari in *Hamilton*. *Cf. McLain v. Calderon*, 134 F.3d 1383, 1385 (9th Cir.1998).

The instruction in this case, just like the instruction held unconstitutional in *McLain*,[4] was inaccurate. Because Coleman had numerous prior felony convictions, the governor alone did not have the power to commute a

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4. The commutation instruction in McLain reads as follows:

> You are instructed that under the State Constitution a governor is empowered to grant a reprieve, pardon or commutation after sentence following conviction of the crime. Under this power, a governor may in the future commute or modify a sentence without-of life without possibility of parole to a lesser sentence, which would include the possibility of parole.
>
> You are further instructed that such power by a governor to commute or modify a sentence is not to be considered by you in determining whether the defendant should be sentenced to death or life imprisonment without the possibility of parole.
>
> You may not speculate as to if or when a commutation or modification would or would not be granted to the defendant. It's not your function to decide now whether the defendant will receive such a commutation or modification at some future date. So as far as you are concerned, you are to decide only whether the defendant should suffer the death penalty or should be permitted to remain alive under the sentence of life imprisonment without the possibility of parole.
>
> If upon consideration of the evidence and instructions you conclude that life imprisonment without the possibility of parole is the proper sentence, you must assume that the governor will perform his duty in a correct and responsible manner and will not commute this defendant's sentence unless convinced that he should be eligible for parole and can be safely released into society, in a correct and responsible manner.
>
> It would be a violation of your duty as jurors if you were to fix the penalty at death because of a doubt that the governor will properly carry out his responsibilities.

McLain, 134 F.3d at 1385-86 n.7.

sentence of life imprisonment without the possibility of parole to a sentence of life imprisonment with the possibility of parole. The governor had to consult with the Board of Prison Terms (although he need not abide by their recommendation) and obtain the approval of four justices of the California Supreme Court. See Cal. Const. Art. 5, § 8 (West 1996); Cal.Penal Code §§ 4802, 4813, 4850-52, 4852.16 (West 1982).

The value of an accurate commutation instruction is its ability to clarify for the jury the meaning of terms such as "life without the possibility of parole." *See Ramos*, 463 U.S. at 1009. An accurate description of sentencing alternatives helps the jury focus on its task of evaluating whether the circumstances of the case and the characteristics of the defendant warrant the imposition of a sentence of death. Where, as here, the court misinforms the jurors about the nature of one sentencing option, the jurors no longer understand the choice they are asked to make. Here, the court inaccurately informed the jury that, unless they sentenced Coleman to death, he could be released into the community on the authority of one person, the Governor. This assertion dramatically overstates the possibility of commuting the life sentence of a person such as Coleman, who had numerous prior felony convictions. The jury was "invited to speculate" that Coleman could be effectively isolated from the community only through a sentence of death. *Hamilton*, 17 F.3d at 1162. Such an instruction inappropriately minimizes the viability of all sentencing options other than death and prevents the jury from deliberating with the guided discretion required by the Eighth Amendment. *See Gregg v. Georgia*, 428 U.S. 153, 189, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

The State argues that the commutation instruction given to Coleman's jury is not inaccurate; it is merely

incomplete. Because a state decides "how much (if at all) juries [should] be informed about the postsentencing legal regime," *O'Dell v. Netherland*, ___ U.S. ____, ____, 117 S.Ct. 1969, 1977, 138 L.Ed.2d 351 (1997), a state may choose to provide the jury with incomplete information.

The information in the commutation instruction given to Coleman's jury, however, is not simply incomplete; it is inaccurate as applied to Coleman. We held in *McLain* that a commutation instruction is prejudicially inaccurate when it creates the false impression that the Governor, acting alone, can commute a life sentence. *See McClain*, 134 F.3d at 1386; *cf. Gallego*, 124 F.3d at 1074-76 (Nevada commutation instruction inaccurate as applied to defendant because defendant may not be paroled if he must answer for a crime in another jurisdiction).

The State also argues that imposing a constitutional requirement to provide more complete commutation information is impermissibly retroactive. *Cf. O'Dell v. Netherland*, ___ U.S. ____, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997) (holding the requirement to inform juries that a defendant was not eligible for parole if the prosecution argues future dangerousness was a new rule under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)). We disagree. *Hamilton* imposes no such requirement. *Hamilton* does not require states to give any particular information about commutation. It simply requires that any information that a state chooses to give be accurate. The instruction in this case was not accurate.

Finally, the State argues that even if the instruction was inaccurate, this error did not have a "substantial and injurious effect or influence" on the jury's sentence of death. *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (quoting *Kotteakos v. United*

States, 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)).

To decide this question, we look to *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990). *McDowell v. Calderon*, 130 F.3d 833, 838 (9th Cir.1997) (*en banc*), *cert. denied*, ___ U.S. ____, 118 S.Ct. 1575, 140 L.Ed.2d 807 (1998). When the inaccuracy undermines the jury's understanding of sentencing options, "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 380.

We conclude the district court did not err in holding that Coleman was denied due process by the state trial court's inaccurate commutation instruction. Because we affirm the district court's issuance of the writ of habeas corpus as to Coleman's death sentence on the ground that the state trial court's commutation instruction was constitutionally deficient, we do not reach Coleman's other challenges to the penalty phase of his trial.

AFFIRMED.

APPENDIX B

BEST AVAILABLE COPY

FILED MAR. 28, 1997
Richard W. Wieking
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

RUSSELL COLEMAN,	)	No. C-89-1906 RMW
	)	
Petitioner,	)	ORDER DENYING
	)	PETITION FOR
v.	)	RELIEF FROM
	)	THE CONVICTION
ARTHUR CALDERON, in his	)	AND GRANTING
as Warden of California	)	PETITION FOR
State Prison at San	)	FOR RELIEF
Quentin,	)	FROM THE
	)	SENTENCE
Respondent.	)	
	)	

Petitioner Russell Coleman is a California state prisoner under sentence of death. He has filed a petition for writ of habeas corpus in this court under 28 U.S.C. § 2254. The court denies relief from the conviction but grants relief from the sentence. After a brief summary of the pertinent facts and procedural history of the case, this order addresses each claim below.

BACKGROUND

Coleman was tried in 1981 for the 1979 murder of Shirley Hill.[1] The prosecution's cane primarily relied on three pieces of circumstantial evidence. First, Coleman's fingerprint, which purportedly tested presumptively

1. For a more detailed account of the trial, *see People v. Coleman* 46 Cal.3d 749, 756-63, 789-95 (1988).

positive for blood, and his palm print were found close to Hill's body. Second, serological tests placed him in the eight percent of the population that could have deposited the semen found in Hill. And, third, Coleman denied, when questioned by the police, that he had ever been in the school bungalow where the offense occurred, but he changed his story at trial.

Coleman presented an alibi defence. He testified that he had been in the bungalow several days before the offense occurred. On the day of the offence, he had attended a class with a friend and then went home, with the friend, where he spent the night with his wife. His wife and friend corroborated Coleman's account.[2] The jury found Coleman guilty of first-degree murder with rape and sodomy special circumstances.

At the penalty phase, the prosecution presented evidence that Coleman had committed two sex-related felonies against young girls, one kidnapping and several acts of violence in prison. The defense presented expert mitigation testimony about the

2. In rebuttal, the prosecution introduced evidence that Coleman had not attended the class that he said he had attended on the day of the offense.

effects of incarceration on Coleman. Coleman's mother and pastor also testified. The jury sentenced Coleman to death.

The California Supreme Court rejected Coleman's direct appeal in 1988, with two justices dissenting. *People v. Coleman*, 46 Cal. 3d 749 (1988). Shortly after the United States Supreme Court denied certiorari in 1989, Coleman filed his initial petition for writ of habeas corpus in this court. The petition was assigned to Judge Peckham. Counsel was appointed and filed a formal petition, raising 13 claims, in January 1990. As Coleman had not yet proceeded through state habeas, the court stayed federal proceedings pending exhaustion of state remedies.

The California Supreme Court summarily denied Coleman's first state habeas petition in 1990. Coleman returned to this court, filing an amended petition in August 1990. In July 1991, the court determined that the United States Supreme Court's decision in *McCleskey v. Zant*, 499 U.S. 467 (1991), warranted a stay of federal proceedings to allow Coleman to conduct additional investigation. *See Coleman v. Vasquez*, 771 F. Supp. 300 (N.D. Cal. 1991).

In June 1992, Coleman filed in this court a third amended petition, which raised 18 claims. The court granted Coleman's motion for an evidentiary hearing on eight of those claims. The hearing was scheduled for February 1993, but Judge Peckham passed away before the hearing.

The case was reassigned to Judge Whyte, who held an evidentiary hearing on the eight claims in March and April of 1994. Shortly after the evidentiary hearing, the court granted petitioner's motion to amend the petition with an additional, already exhausted claim. In March 1995, the court granted in part petitioner's latest motion to amend, which added two more exhausted claims.

This order addresses all Coleman's grounds for relief raised in his federal habeas petition, as ultimately amended.[3]

GUILT-PHASE CLAIMS

1. Competency to stand trial

Coleman argues that he was incompetent to stand trial and that his conviction is therefore unconstitutional.[4] Respondent contends that Coleman was competent to stand trial. He also maintains that the state court's finding of competence is entitled to a presumption of correctness under 28 U.S.C. § 2254(d).

A. State court proceedings

After jury selection but before the trial started, trial counsel Peter Keane told the trial court that he believed Coleman was incompetent to stand trial. RT 2.[5] He asked the court to appoint a mental-health expert to examine Coleman to determine whether a competency hearing was necessary. RT 2-9; *see* Cal. Penal Code §

3. Because several of the claims have been reconfigured since they were originally raised, however, the order includes only 18-separate claims.

4. Coleman does not challenge the trial court's denial of his motion for a hearing to determine his competency to stand trial. *See Pate v. Robinson*, 383 U.S. 375 (1966).

5. This order refers to the record and district court evidentiary hearing materials as follows: RT (page) = reporter's transcript of Coleman's 1981 trial; (date) RT at (page) = trial-court transcript not included in the consecutively numbered reporter's transcript; (date) EH at (page) = evidentiary hearing transcript; Ex. (number) = evidentiary hearing exhibit; (name) depot at (page) = evidentiary hearing deposition.

1368. At the same time he asked the court to enter plea of not guilty by reason of insanity. RT 3.

Keane based his requests on his experience representing Coleman over the course of the Previous Year and a half.

> And he has had, over the course of my representation of him, periods of lucidity in which we work together quite well. There are other times during the course of that where he has exhibited very bizarre behavior, strange behavior, has talked about things such as he talked about this morning regarding plots against him, has had what I would say a [sic] delusional set of thought patterns in that regard.

RT 2. Keane also referred to the time Coleman spent in San Francisco General Hospital in January 1980, shortly after his arrest. RT 6. Coleman was diagnosed, according to Keane, "as a paranoid schizophrenic," with "severe delusions, severe thought disorders.'" RT 8. He also told the court about Coleman's visits just before his arrest to Dr. Studenski, with whom he discussed his mental and emotional problems. RT 6, 8.

Keane also referred specifically to statements Coleman had made earlier that day. Coleman told the court that he was opposed to Keane representing him. Coleman objected to Keane's failure to call alibi witnesses at his previous trial. He blamed Keane for a beating he allegedly received in San Quentin and for interfering with his legal mail. Coleman claimed that Keane was in cahoots against him with the head of the San Quentin adjustment center and with the prosecutor. 11/3/81 RT 1-5, 7-8.

Coleman told the trial court that he opposed Keane's insanity plea. Although he maintained that he was competent to stand trial, Coleman agreed to talk to a court-appointed psychiatrist. RT 3-4, 7.

The trial court stated that it did not doubt Coleman's competency to stand trial and declined to appoint a mental-health expert to examine Coleman. RT 10. The defense had access to such experts, the court noted, but Keane had not presented any expert opinion that Coleman was incompetent.[6] Id. The trial court also based its determination on its own assessment of Coleman:

> Mr. Coleman, we greet each other between court sessions, three, four times a day out in the back corridor, and he appears to be oriented as to time, place, recognize where he is, what he is doing here, what the nature of these proceedings are, and I am sure that he has his own thoughts about his defense posture.

RT 11-12.

During the prosecution case, Keane argued again that Coleman was incompetent to stand trial. RT 166. Coleman had repeatedly told the jury that he disagreed with Keane and that Keane did not represent him. See, e.g., RT 67-68, 121-22, 183-84, 209. Outside the jury's presence, Coleman also complained to the trial court that a member of the

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6. Keane retained psychiatrist George Bach-y-Rita before the trial. He consulted with Bach-y-Rita about possible mental defenses for the guilt phase and mental-status mitigation for the penalty phase. Keane did not ask him to evaluate Coleman's competency to stand trial, and he had no contact with Bach-y-Rita after the trial began. 3/23/94 EH at 117-20.

At some point during the guilt phase, Keane also retained psychologist Linda Carson to evaluate Coleman's competency. Coleman refused to talk to Carson, no Keane asked her to develop an opinion about Coleman's competency by observing his behavior during the trial. After watching some of the trial, Carson had ideas about Coleman' n mental state. She told Keane that she could not provide a definitive opinion without interviewing and testing Coleman, however. 3/23/94 EH at 145-46.

defense team was "making non-verbal communication with certain female members of the jury . . . making eye contact and giving them non-verbal communication, body language." RT 164.

The trial court said that it had not observed any such communication between the defense team and the jury. It also noted that Coleman spoke "in a well modulated low speaking voice." Concluding again that Coleman did not appear incompetent, the trial court offered to review any expert opinion to the contrary. RT 165-66.

The next day, Coleman repeated his previous allegations about Keane's alliance with the prosecution. He also accused Keane of neglecting his case, of mismanaging defense money, of not visiting him and of lying to him. RT 210-13, 219-20. Keane again argued that the trial court should appoint an expert to determine whether Coleman was competent to stand trial. RT 214-19.

The trial court asked both parties whether Coleman had ever been evaluated by a court-appointed mental-health expert. RT 220-21. The prosecutor provided the court with a January 28, 1980, report by Department of Corrections psychiatrist Hobart Banks. The Banks report, which the trial court read into the record, concluded that Coleman "is not psychotic and his apparent atypical behavior is under conscious control." RT 221-222; see Ex. LL. The trial court then appointed Dr. Roland Levy to examine Coleman and recommend whether it should hold a competency hearing. RT 222.

Coleman's outbursts against Keane continued. See, e.g., RT 228, 262, 413, 438-39. He interrupted police inspector Walter Ihle, who testified about fingerprint evidence. RT 300, 302, 313, 327, 343, 348, 350, 354. He complained to the trial court that Keane moved his seat to prevent him from communicating with co-counsel Patrice McElroy. RT 333-37. He also objected that a

woman was drawing pictures of him, which was against his religion. RT 460, 462.

Dr. Levy met with Coleman on Saturday, November 7, 1981, just before the close of the prosecution case. RT 534. In court the following Monday, Coleman stated,

> After talking to [the psychiatrist], I think I am going to go along with Mr. Keane, and allow him to present the type of defense that he wants to present, and whatever he wants to do. I am going to go along with him. I may well be taking the stand, if that is what he wants me to do.

RT 535.

Later that morning, the court noted that it had received a message from Dr. Levy. "The message was Mr. Coleman is competent to stand trial." RT 546. At the start of the penalty phase, the trial court gave a copy of Dr. Levy's report to both parties. RT 804-05. The record does not reflect any further discussions or findings about Coleman's competency to stand trial.

Coleman next raised the claim that he was incompetent to stand trial in his second state habeas petition. The California Supreme Court denied the claim on the merits without a hearing or comment. See In re Coleman, No. S025597, 1992 Cal. LEXIS 1660 (1992).

B. Analysis

1. Presumption of correctness

State-court determinations about a defendant's competency to stand trial are entitled to a presumption of correctness. See Demosthenes v. Baal, 495 U.S. 731, 735 (citing Maggio v. Fulford, 462 U.S. 111, 117 (1983)); Moran v. Godinez, 57 F.3d 690, 696 (9th Cir. 1994). This court must apply the presumption unless it concludes that

the determinations were not "fairly supported by the record." See 28 U.S.C. § 2254(d); Demosthenes, 495 U.S. at 735; Brewer v. Lewis, 989 F.2d 1021, 1027 (9th Cir. 1993).

Coleman argues that the presumption of correctness does not apply for two reasons. First, he claims that the trial court applied the wrong standard to determine competency. Second, Coleman claims that the evidence does not support the trial court's finding.

The state-court trial of a defendant who is incompetent violates due process. See Godinez v. Moran, 113 S. Ct. 2680, 2685 (1993); Pate v. Robinson, 383 U.S. 375, 37-8 (1966). A defendant is competent to stand trial if he "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and . . . a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 (1960). The trial court must do more than find that the defendant is oriented as to time and place and has some recollection of events. See id; de Kaplany v. Enomoto, 540 F.2d 975, 979 (9th Cir. 1976). This standard has been applied by federal habeas courts considering retrospective claims of incompetency to stand trial in state court. See, e.g., Hernandez v. Ylst, 930 F.2d 714, 716 n.2 (9th Cir. 1991); Boag v. Raines, 769 F.2d 1341, 1343 (9th Cir. 1985); de Kaplany, 540 F.2d at 979. The trial court did note that Coleman appeared oriented to the time and place. RT 11-12. It is clear from the record, however, that its competency determination did not rest on that observation alone. The trial court made that observation early in the trial; it had ample subsequent opportunities to speak with Coleman and to gauge his ability to consult with Keane and to understand the proceedings.

In addition, the trial court's actions indicate that it kept an open mind about Coleman's competency at least until it received Dr. Levy's report. The trial court

repeatedly asked the parties for reports from experts that might reflect on Coleman's mental status. It read into the record the one report it received, which was provided by the prosecutor. See RT 10, 165- 66, 220-22. The trial court ultimately appointed an expert, Dr. Levy, to examine Coleman. RT 222.

Dr. Levy's report, dated November 7, 1981, is addressed to the trial court. See Ex. 17. The report refers to an "acute psychotic episode" at San Francisco General Hospital as well as to prior prison psychiatric diagnoses of paranoid personality, borderline personality and anti-social personality. Id. at 3. According to Dr. Levy, Coleman "has the capacity to understand the charges and the nature of the proceedings against him, and he also has the ability to cooperate in a rational manner with counsel in the preparation and presentation of a defence." Id. His language clearly indicates that Dr. Levy applied the correct Dusky standard in reaching his conclusion that Coleman was competent to stand trial. The trial court noted Dr. Levy's conclusion on the record, and the trial proceeded with no further discussion about competency.

The record thus reflects that the trial court made an implicit factual finding that Coleman was competent to stand trial. See Tinsley v. Borg, 895 F.2d 520, 525-26 (9th Cir. 1990). The trial court based its finding on Dr. Levy's conclusion, which found Coleman competent in light of the correct legal standard, and on its own observation of Coleman. This court concludes that the trial court did not err in the legal standard it used to determine Coleman's competency. See Tinsley, 895 F.2d at 525 (on habeas, the court may presume that the trial court applied the correct legal standard when the record is unclear) (citing Wainwright v. Witt, 469 U.S. 412, 431 (1985)).

2. Support in the record

Coleman also argues that the trial court's competency finding is not supported by the record. After reviewing the trial transcript and the mental-health reports on which the trial court relied, this court concludes that the record supports the finding of competency. "Although no particular facts signal incompetence, suggestive evidence includes a defendant's demeanor before the trial court, previous irrational behavior, and available medical evaluations. Moran, 57 F.3d at 695. The court accords considerable weight to the trial court's contemporaneous observations of Coleman's conduct and demeanor over the course of the trial. See Maggio, 462 U.S. at 137.

Coleman made numerous disruptive statements during his trial. Most of the statements expressed his distrust of Keane, other members of the defense team or prosecution witnesses. Although the statements often demonstrate a disregard for Coleman's own best interest, they also indicate that he was keenly aware of and involved in the proceedings against him. When inspector Ihle was on the stand, in particular, Coleman's questions reveal that he followed the testimony and understood its importance and its potential weaknesses. See, e.g., RT 343, 354, 385, 396.

The record also suggests that Coleman had the ability, if not the will, to cooperate with Keane. See Guam v. Taitano, 849 F.2d 431, 432 (9th Cir. 1988) (refusal to cooperate with counsel does not automatically render defendant incompetent to stand trial). After his interview with Dr. Levy, Coleman told the trial court that he would go along with Keane's defense and take the stand if Keane so advised. RT 535. For the last two days of the trial, Coleman made no further disruptive statements. He testified coherently and without incident. RT 559-99.

Coleman's in-court behavior alone could not establish that he was competent to stand trial if there were strong

evidence to the contrary. See de Kaplany, 540 F.2d at 980 (citing Pate, 383 U.S. at 385-86). In this case, however, the trial court did not have before it any solid evidence that Coleman was incompetent. As noted above, the trial court relied on Dr. Levy's determination, after an examination, that Coleman was competent at the time. The January, 1980, Banks report that the trial court read into the record, while noting abnormality, is consistent with a finding of competence to stand trial. See RT 221-22; Ex. LL. Keane mentioned Coleman's January, 1980, San Francisco General hospitalization and his visits to Dr. Studenski, but did not offer the trial court any supporting documentation.

For these reasons, this court concludes that the trial court's finding that Coleman was competent to stand trial is entitled to the statutory presumption of correctness. At the evidentiary hearing and through habeas exhibits Coleman has presented additional evidence about his competency to stand trial in 1981. As discussed below, however, he has not met his burden of showing by convincing evidence that the trial court's finding was erroneous. See 28 U.S.C. § 2254(d); see also Austad v. Bisley, 761 F.2d 1348, 1350-51 (9th Cir. 1985).

3. Evidentiary hearing evidence

The court notes, as a preliminary matter, the difficulty of making retrospective competency determinations. See Moran, 57 F.3d at 696. The parties have presented conflicting evidence about Coleman's competency and mental condition at the time of his trial. Dr. Levy concluded in 1981 and reaffirmed his conclusion at the evidentiary hearing that Coleman was competent to stand trial. Ex. 17 at 3; 3/28/94 EH at 38. Dr. Kessler, a psychiatrist who interviewed Coleman in April 1977 in connection with an earlier trial, also found Coleman

competent to stand trial.[7] Ex. 9 at 5; see Blazak v. Ricketts, 1 F.3d 891, 897 (9th Cir. 1993) (previous psychiatric evaluations directed toward competency to stand trial are probative). The court accords these evaluations considerable weight, particularly the contemporaneous evaluation of Dr. Levy. "[M]edical reports contemporaneous to the time of the initial hearing greatly increase the chance for an accurate retrospective evaluation of a defendant's competence." Moran, 57 F.3d at 696.

By contrast, Dr. Woods, a psychiatrist who interviewed Coleman four times between December 1992 and March 1994, testified at the evidentiary hearing that Coleman was incompetent to stand trial in 1981. 4/6/94 EH at 21, 32, 77. Specifically, Dr. Woods testified that Coleman understood the nature of the proceedings against him. Because he was suffering from a serious mental disorder, however, Coleman could not-help Keane develop and present a defence, according to Dr. Woods. Id. at 33.

The testifying mental-health experts agreed generally that Coleman had at least two brief psychotic episodes, in 1980 and 1983. Between those episodes, he exhibited paranoid symptoms and possibly other traits suggesting mental illness. See 3/28/94 EH at 72 (Levy); 4/6/94 EH at 68 (Woods). The expert testimony and other mental-health evaluations presented[8] suggest to the court

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7. Dr. Kessler was ordered by the trial court to evaluate Coleman under California Evidence Code § 1017 and provide a confidential report to Coleman's attorney. See Ex. 9 at 1; 3/28/94 EH at 22.

8. The documentary evidence about Coleman's mental health is conflicting. In a 1977 psychiatric evaluation for the Community Release Board, Dr. Brandmeyer diagnosed Coleman as "paranoid personality" but concluded that "[h]e is not psychotic." Ex. 13 at 3. A year later, Dr. Geiger provided a diagnosis of "personality disorder, antisocial personality" and noted that Coleman has "definite ideas of reference." Ex. 14 at 2-3. Shortly afterwards, while Coleman was on

that Coleman likely had some form of mental illness at the time of his trial.

Neither expert testified that Coleman's mental condition prevented him from understanding the proceedings against him. See, e.g., 4/6/94 EH at 33 (Woods). Under Dusky, however, the question remains whether Coleman was incompetent because he was unable rationally to consult with his attorney. See Medina v. California, 112 S. Ct. 2572, 2580 (1992) (defendant's inability to assist counsel at competency hearing may itself constitute probative evidence of incompetence). But see Godinez, 113 S. Ct. probative evidence of incompetence) at 2689 (Kennedy, J., concurring) (defendant's ability to consult with counsel serves only to help identify his level of mental functioning, which is the true focus of Dusky).

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parole, Dr. Studenski proposed three possible diagnoses: borderline syndrome, schizophrenia and chronic depression. Ex. 15.

After his arrest for the instant offense in January 1980, Coleman was admitted to San Francisco General Hospital for psychiatric observation. Ex. 16 at 19. He was agitated and hostile and had delusional ideas, suicidal ideation and auditory hallucinations. He had taken PCP approximately a week before admission to the hospital. Treated with Haldol, an anti- psychotic medication, Coleman showed "marked improvement." Coleman refused to be held for further observation, as was recommended, and was released. The final diagnosis was "acute psychotic episode." Id. at 20. A week later, Dr. Banks evaluated Coleman as not psychotic, as noted in the report read into the record by the trial court. See Ex. LL.

Coleman had a similar psychotic incident in September 1983. See 3/28/94 EH at 57, 71 (Levy); 4/6/94 EH at 60-62 (Woods). Dr. Geiger noted "loose thought association," ideas of reference, poor concentration, "significantly, bizarre content to [his] mental process," depersonalization, "misinterpretation of reality and . . . acting on this disordered thought . . . ." He diagnosed Coleman as having "atypical psychosis." Ex. 18 at 1. Coleman was treated with Prolixin Decanoate, another anti-psychotic drug; within a week his judgment had improved and there was no indication of serious disturbance. Id. at 1, 3.

As the experts agreed, a defendant's thought or personality disorder could affect his ability to cooperate with counsel. 3/28/94 EH at 49 (Levy); 4/6/94 EH at 33, 97 (Woods). But the presence of mental illness does not necessarily render a defendant legally incompetent to stand trial. See 3/28/94 EH at (Levy); 4/6/94 EH at 98 (Woods). A defendant who is unwilling -- as opposed to unable -- to assist his attorney is not incompetent. Id.

Coleman has presented uncontradicted evidence that he exhibited paranoid beliefs at the time of his trial. See, e.g., 3/28/94 EH at 72, 74-75, 79-82, 90; 4/6/94 EH at 172, 179. He argues that these beliefs prevented him from cooperating with Keane, the object of his paranoia. Keane stated at the hearing that a strong indicator of Coleman's paranoia was his eagerness to testify despite Keane's cautions against it. 3/23/94 EH at 109, 115-17. The trial record does not support Keane's recollection: Coleman was apparently reluctant to testify, and Keane was frustrated because he had trouble convincing Coleman to take the stand. See RT 3-5, 216-17. Coleman ultimately cooperated, however, and the record shows that he testified coherently on both direct and cross-examination.

The court finds that Coleman demonstrated that he could adequately cooperate with counsel when he took the stand and testified on his own behalf. See 4/6/94 EH at 185 (Woods agrees that testifying indicated cooperation). The court is not convinced that Coleman's evidence establishes his incompetence. In light of his testimony, as well as the contemporaneous conclusions of Dr. Levy and the presumption of correctness accorded the trial court's findings, the court concludes that Coleman was competent to stand trial in 1981.

2. State's failure to disclose other suspects

Coleman claims that the state failed to tell the defense before trial that it had investigated three other

suspects in the murder of which he was convicted. Because the prosecution did not disclose this material, exculpatory information, Coleman argues, his conviction is unreliable.

Respondent disputes petitioner's contention that the other- suspect information was never disclosed to Coleman's defense team. He also contends that the evidence is inadmissible and immaterial and therefore would not have affected either the guilt or penalty verdict.

A. Relevant facts

Documents in the police department's file show that the police had several other leads in the case. A friend of the victim called the police and stated that Shirley Hill's former boyfriend, Art Willis, whom she believed was violent, had been following Hill. Ex. 7 at 2. A note written by police inspector Mullane indicates that Hill had been seeing a man named Arnold McKnight. The note also said that she had been bothered by Harold Fisher, who had served time for rape. Id. at 1; see Mullane depo. at 8. Inspector Mullane did not interview Fisher, but he ran a check on his criminal activities. Mullane depo. at 9. The files also include various law-enforcement reports about John B. Henry. The reports show that Henry had been arrested for offenses including a rape-kidnap-assault with a deadly weapon that occurred near the site of the instant offense. See Stipulation Re Police Interviews Re Harold Fisher, Art Willis, and John B. Henry, Attachment 1.

The police eliminated these men as potential perpetrators when their fingerprints were found to be inconsistent with those found at the crime scene. The police never compared hair samples from these leads with hair found in Hill's hand. They never checked their blood types against the blood type, determined from the semen sample, of Hill's killer.

Uncontradicted deposition testimony suggests that the prosecution was aware of these other leads. It was the practice of the police at the time to provide their entire investigation file to the prosecutor for discovery. See Schneider depo. at 11. In this case, the District Attorney's office received the police investigation file at some point. Id.; Mullane depo. at 11. Coleman's prosecutor, William Fazio, would have reviewed the entire police file before trial. Fazio depo. at 11. Inspector Schneider most likely discussed leads other than Coleman with the prosecutor. Schneider depo. at 11-12.

Coleman contends that the prosecution did not disclose this information to any one on his defense team before trial. Neither Schneider nor Mullane spoke with Coleman's defense team about other potential suspects. LL at 17; Mullane depo. at 7. The police notes about these leads were not in the prosecutor's file and have no discovery stamps. Neither trial counsel Keane nor his investigator, Russell Stetler, saw these notes before Coleman's trial. 3/22/94 EH at 48-50 (Statler); 3/23/94 EH at 90-91 (Keane).

Other-suspect evidence would have been consistent with Coleman's alibi defense and other evidence presented at trial. RT 678 (prosecutor argues that identity is the only issue in the case). The evidence against Coleman consisted of fingerprints at the scene, his initial denial to the police that he had ever been at the scene and semen in the victim's vagina and rectum that matched his blood type. Keane elicited testimony on cross-examination that the police found an unidentified fingerprint on a chair at the scene, one of two places where Coleman's prints also were found. RT 418. The officer also testified that he looked for fingerprints around the body, but not around the entire crime scene. RT 410, 19-20.

B. Analysis

Prosecutors have a duty to disclose evidence favorable to the defense that is material either to guilt or to punishment. The duty applies to prosecutors in state-court criminal proceedings. See Kyles v. Whitley, 115 S.Ct. 1555, 1559 (1995). The failure to disclose such evidence violates due process. See Brady v. Maryland, 373 U.S. 83, 196-97 (1963).

Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985); see also United States v. Kennedy, 890 F.2d. 1056, 1058-59 (9th Cir. 1989). Petitioner does not need to show that he would have been exonerated, just a reasonable likelihood that the degree of conviction would have been lower had the information been disclosed. See Kyles, 115 S. Ct. at 1566.

To be material either the "undisclosed information or evidence acquired through that information must be admissible." Kennedy, 890 F.2d at 1059. To determine materiality, a reviewing court may consider any adverse effect that the prosecutor's failure to disclose might have had on the preparation or presentation of the defense case. Bagley, 473 U.S. at 683; Kennedy, 890 F.2d at 1059. It may not, however, base its determination on unsupported speculation about the effect of the undisclosed material. See Wood v. Bartholomew, 116 S. Ct. 7, 10 (1995).

Thus, the critical components of a Brady claim are: 1) suppression by the prosecution of 2) information favorable to the defense that is 3) material to guilt or punishment. See Moore v. Illinois, 408 U.S. 786, 794-95 (1972). The parties do not dispute that the information about potential suspects other than Coleman was

favorable to the defence. As for the first component, it appears from the evidentiary hearing testimony that the prosecution did not disclose this other-suspect information to the defense. The information was not in the prosecutor's file and did not have a discovery stamp. Keane and investigator Stetler offered uncontradicted testimony that they never saw the other-suspect information.

Respondent suggests that Coleman has the burden of showing that he never saw the information. He contends that Coleman has not presented either the complete defense file, which is apparently not available[9] (see 3/23/94 EH at 140), or evidence from Coleman's preliminary-hearing counsel to show that the defense never received the police reports.

Recent Ninth Circuit cases suggest that, at least in some instances, the state bears the burden of proving that it disclosed material, exculpatory evidence. See United States v. Hanna, 55 F.3d 1456, 1460 (9th Cir. 1995) (prosecution "should be required affirmatively to demonstrate whether it discharged its obligation under Brady to provide the defense with impeachment evidence within the government's possession"); United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th Cir. 1993). Brady and its progeny emphasize that the prosecution has a duty, even absent a request from the defence, to disclose material exculpatory evidence. See e.g., Kyles, 115 S. Ct. at 1567-68; Agurs, 427 U.S. at 107; Kennedy, 890 F.2d at 1058. Aware of this duty, prosecutors have an incentive to develop procedures for ensuring and verifying compliance with Brady.[10] From a practical perspective also, it should

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9. The parties stipulated that the defense file currently in the custody of petitioner's counsel does not include any police reports or discovery material.

10. Here, for example, both prosecutors testified that, as a matter

be easier to establish disclosure than to show a lack of disclosure. The court thus concludes that the burden of proof should rest on respondent, since Coleman has made a prima facie case that some allegedly material information was not disclosed.

Because the other-suspect information was undisclosed and favorable to the defence, Coleman's claim turns on whether it was material. The information consisted of police notes from telephone conversations about two acquaintances of the victim, one who was "violent" and the other who had "served time for rape" and had been bothering her. It also included law-enforcement reports about a third man who had been arrested for rape and assault with a deadly weapon near the location of the offense for which Coleman was on trial.

Respondent contends that because the information would not have been admissible, it could not be material. Ninth Circuit law is to the contrary. The information may be material, even if inadmissible itself, if it could lead to admissible evidence. See Kennedy, 890 F.2d at 1059. If the information had been disclosed, Keane would have investigated the suspects. 3/23/94 at 91 (Keane); 3/22/94 RT at 48 (Statler); cf. Wood, 116 S. Ct. at 10-11 (inadmissible information not material where counsel would not have used information on cross-examination at trial). Pre-trial investigation might have led to evidence linking the suspects to the offence. See Banks v. Reynolds, 54 F.3d 1508, 1518-19 (1Oth Cir. 1995) (finding Brady violation for failure to turn over information about other suspects arrested for offense because counsel could have used it to uncover other leads and defense theories). Evidence linking other suspects could have been admitted

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of practice, if a Brady issue arose they would try to prove that the defense had the information in its files. See Lassart depo. at 19; Fazio depo. at 47.

under California law. See People v. Hall, 41 Cal.3d 826, 833 (1986) (direct or circumstantial evidence linking another suspect to the actual perpetration of the offense is admissible). Coleman has not indicated, however, what admissible, exculpatory evidence he would have uncovered had he been aware of and investigated these other suspects.

The court concludes that, on the facts of this case, the information about the other suspects was not material. It is undisputed that the fingerprints of the suspects did not match the fingerprints found at the crime scene. Cf. Banks at 11 (fingerprints of undisclosed suspect never compared to unidentified prints found at scene). The jury knew that the prints in the bungalow had been compared with fingerprints from 154 "known suspects[]" before the police found that they matched Coleman's. RT 349. But see RT 687 (prosecutor argues that "there is no evidence that [the victim] had any enemies").

Had the information been disclosed to Keane, he still would have had to contend with the fact that Coleman left his fingerprints in the bungalow. Furthermore, Coleman's fingerprints were found in a location that tended to implicate him -- on a window sill next to the victim's prints and close to where her body was found. It is not reasonably possible that the other-suspect information could have "put the case in such a different light as to undermine confidence in the verdict." Kyles, 115 S. Ct. at 1566; see also Wood, 116 S. Ct. at 11 (habeas relief not warranted where court's conclusion that undisclosed information is material rests on "little more than speculation with slight support").

The jury did not deliberate for long, which suggests that it did not view this as a close case. See Hamilton v. Vasquez, 17 F.3d 1149, 1163 (9th Cir. 1994) (three-day penalty-phase deliberation suggests a close case). But see People v. Coleman, 46 Cal.3d 749, 788-89 (1988) (Mosk and Broussard, concurring and dissenting) (evidence

against Coleman was "demonstrably thin" and "weak"). Because identity was the only issue at trial, it is not reasonably likely that the other-suspect information would have affected the degree of Coleman's conviction. See RT 698 (prosecutor argues that the jury must either convict Coleman of felony-murder or acquit him completely). The court is not convinced that there is a reasonable probability that the outcome of Coleman's trial would have been different had the information been disclosed. See Wood, 116 S. Ct. at 11; Bagley, 473 U.S. at 682; Kennedy, 890 F.2d at 1O58-59; cf. Banks at 12-13. His Brady claim about other-suspect information is therefore denied.

3. Introduction of Hemastix test results

Coleman claims that he was denied his right to due process and to confront testimony about the results of a presumptive test for blood that was both undisclosed to the defense and unreliable.[11] The state responds that any discovery or evidentiary error that occurred does not provide a constitutional basis for habeas relief.

A. Background

Police identified prints from Coleman in two locations at the crime scene. His palm print was found on the inside ledge of window sill, next to fingerprints of the victim. RT 467. His thumbprint was found on the back of a chair back. RT 356-57. Four smudged fingerprints, otherwise unidentifiable, on the front of the chair back were likely laid down at the same time as the thumbprint by the same

11. Coleman also argues that Keane rendered ineffective assistance by failing properly to investigate and confront this evidence. This portion of the claim will be discussed in the section on ineffective assistance of counsel, below.

hand. RT 357-59. All the fingerprints on the chair back appeared slightly discolored. RT 358-59, 405; Ihle depo. at 45.

The fingerprints and evidence at the crime scene were gathered by police inspector Ihle. Ihle applied powder to the chair back, lifted the thumbprint and placed it on a latent lift card. RT 346, 405. He then tested the thumbprint with a Hemastix,[12] which provides a presumptive test for the presence of blood.[13] RT 359. The test indicated that blood was present on the back of the chair back. RT 406.

When a fingerprint was determined to be bloody, it was standard police procedure to indicate that on both the object and on the latent print card. See 1/7/93 Joint Pretrial Statement at 6. Ihle's practice was to write "blood" on the same side of the object that he had tested for the presence of blood. Ihle depo. at 29-31. Ihle wrote "bloody prints" on the front of the chair back when he lifted the prints and used the Hemastix. RT 369; see also Ex. 141 (chair back). Contrary to standard practice, he did not note on the latent lift card that the print had tested positive for the presence of blood. See Ex. 126.

Ihle discarded the Hemastix after he tested the chair back. RT 374. Neither the bloody fingerprint nor the Hemastix test was mentioned in any police report. RT 375-76; Ihle depo. at 29, 51; see also Ex. 5 (police inventory of evidence from crime scene noting that "usable latent prints were developed"). Police reports did not refer to additional, unsuccessful, attempts to test the fingerprint for the presence of blood. RT 408. The day of the test or

12. Hemastix is a registered trademark for a chemical-coated plastic strip used to test fresh urine for the presence of blood. Ex. 38.

13. Ihle testified in his 1991 deposition that he performed the Hemastix test before dusting the chair back for fingerprints. Ihle depo. at 29-31.

shortly afterwards, however, Ihle told police inspectors Moses and Schneider that the thumbprint had tested presumptively positive for blood. RT 375-76. He also told the first prosecutor, Lassart, about the test before Coleman's preliminary hearing. RT 376.

Coleman was represented at his preliminary hearing by retained counsel Charles Gush.[14] Gush had never handled a homicide trial before he was retained by Coleman's family. 8/19/80 RT at 21. Before the preliminary hearing, Gush viewed the physical evidence in the case, including the chair back. Id.; RT 377. Gush did not tell Keane, who replaced him as Coleman's attorney after the preliminary hearing, about any discovery matters. RT 379.

At the preliminary hearing, Ihle testified on direct examination only about the prints found on the window sill. 3/5/80 RT at 11-21. On cross-examination, Gush asked Ihle about the procedure for classifying and comparing fingerprints. Id. at 26-28. The following exchange between Gush and Ihle then occurred:

> Q. When you examined the scene there were there any bloody fingerprints?
>
> A. No, there were not.
>
> Q. Was there any blood in the area?
>
> A. A very, very, very minimal amount of blood around the area of the body, very close to the body, and I feel that as the body was laying there it came from the face.

14. After Keane was appointed to represent Coleman, he moved for a new preliminary hearing on the grounds that Gush had provided ineffective assistance of counsel. 8/19/80 RT at 4-5. After a three-day hearing, the trial court denied the motion. 8/21/80 RT at 285.

* * *

> Q. Did you take any fingerprints, did you lift any fingerprints off of the back of any of the chairs in this room?
>
> A. Yes.

Id. at 28-29.

After the preliminary hearing, Keane moved for discovery. The prosecution was ordered to comply with a San Francisco standing discovery order on April 8, 1980. Ex. 1; "see also 3/23/94 EH at 61-62 (Keane). The order required the prosecution to "provide and furnish for inspection, copying and use" materials including:

> 3. All statements and utterances of . . . testifying witnesses relating to the case against the defendant, however recorded or preserved . . . .
>
> 5. Examination of all physical evidence obtained in the investigation of the case against defendant.
>
> 6. All laboratory, technician's and other reports concerning the testing and examination of said physical evidence.

Ex. 2.

Neither the police nor the prosecution informed the defense before trial that a Hemastix test had been done or that the chair back tested positive for the presence of blood. The photographs of the crime scene that were in the prosecutor's file and disclosed during pre-trial discovery do not show the word "bloody" on the chair

back. The prosecutor, Fazio, discussed the fingerprints during his opening statement but did not mention the blood, although he knew about it at the time. RT 63-67. Although a defense investigator and fingerprint expert examined the latent lift card, no one on Coleman's trial defense team examined the chair back.

According to Keane, he first learned about the bloody fingerprint on the first day of trial, during the testimony of the coroner, Dr. Sisson. Outside the jury's presence, Sisson said that Fazio had told him the previous day that a bloody fingerprint had been found. RT 130. Fazio had learned about the bloody fingerprint some time before trial. Fazio depo. at 24; Ihle depo. at 55. He did not know that Ihle had used a Hemastix to test the print for the presence of blood, however, until the night after Sisson's testimony. That night, Ihle told Fazio about the test during a discussion in preparation for his testimony the next day. RT 362.

Ihle testified that he made a preliminary test for blood on the thumb print. RT 359. In chambers, Keane moved to strike the testimony. He argued that Ihle was unqualified to testify about the blood test and that the defense had never been told about it. RT 360-61.

Fazio argued that Keane had notice of the bloody fingerprint from a transcribed police interview with Coleman that mentioned his fingerprints and from the writing on the chair back. RT 362- 63. Keane responded that he had not taken seriously the transcript's mention of "bloody fingerprints." He argued that he had no notice of the bloody fingerprint from either discovery or the preliminary hearing testimony. RT 363-65. Keane noted that his fingerprint expert had inspected the prints on the latent print card but was not given the chair back. RT 367-68. He also stated that he asked several times to see the physical evidence, but the prosecution was uncooperative. RT 369.

The court then concluded that whether the evidence was admissible would depend on Ihle's qualifications.

> It appears that between what is written on the back of this item or on the back of that chair, what is in this transcript of the tape, that whatever evidence concerning the presence or absence of blood on the back of the chair will depend on the witness qualifying, not on the lack of notice or lack of discovery.

RT 369.

Keane then questioned Ihle in chambers about his knowledge of and experience with the Hemastix test. Ihle testified that he conducted the test by moistening the test strip and passing it over the area to be tested. A change in the color of the stick suggested that blood was present. RT 370. Ihle did not know the chemical process that caused the Hemastix to change colon Blood was the only substance that he knew would cause the reaction; he knew from reading the label and from his own tests that the Hemastix would not react to urine, catsup or tomato sauce. RT 371-72. The test did not differentiate between human blood and any other type of blood. "It is a presumptive test that indicates blood of some type." RT 386.

Ihle had been using Hemastix tests for about three years to determine whether a piece of potential evidence should be collected for further testing. RT 370, 387. "[T]he basis of putting this into one of the field evidence kits was the fact that from my own particular testing, it was reliable and it would give us a chance with something that was not . . . evidently blood." RT 374. Ihle had testified several times before about Hemastix test results. RT 373.

After the in camera examination of Ihle, Keane argued that his testimony should be excluded. Ihle had not

presented an adequate foundation for the trial court to determine the reliability of the Hemastix test, according to Keane. RT 387-88. He also argued that the prosecution had a state-law duty to preserve the Hemastix itself so the defense could have viewed and tested it. RT 388. The prosecution responded-that the Hemastix was a "valid tool used by members of the crime laboratory" and that Ihle could properly testify to his conclusion based on his observations of the test. RT 390. At Keane's request, Ihle conducted a Hemastix test on the chair back in chambers. He tested two spots -- both apparently on the front of the chair back[15] -- but obtained no reaction. RT 396.

The trial court ruled that the defense had adequate notice of the bloody print. In addition to the words on the chair back, the trial court also noted that a "report from the Department of Corrections, the psychologist, dated January, 1980, refers to a bloody palm print." RT 391. It found the Hemastix test reliable based on Ihle's and the crime lab's experience with the test. RT 401, 403.

Ihle's testimony before the jury essentially repeated his testimony in chambers. He testified that the Hemastix is a presumptive test for blood, usually used in urinalysis. RT 407. Ihle told the jury that a positive result did not identify the substance as human blood, that he did not understand the chemical reaction and that not enough blood remained for further testing after the initial Hemastix test was done. RT 406-08; see also RT 413-14, 417 (consistent testimony on cross-examination).

On cross-examination, Keane elicited testimony that Ihle had tested Hemastix on only four or five substances other than blood. RT 4. Ihle testified that he did not know whether the fingerprint powder he used on the chair back could have affected the results of the Hemastix test. RT 417. But see RT 425 (on re-direct, Ihle testified that the

15. Ihle said, however, that he tested in chambers the same area of the chair back that he tested at the crime scene. RT 399

test he had just done in chambers suggested that the fingerprint powder would not produce positive Hemastix result). Ihle also testified on cross-examination that the Hemastix test gave a negative result when he tried it in chambers. RT 418. Ihle confirmed that he did not have the initial Hemastix test confirmed by a chemist. RT 423.

Edward Blake, a forensic serologist called by the prosecution to testify about blood typing, also testified briefly about the Hemastix. He stated that the test was most often used "in clinical chemistry to test for blood in stools" and that it was a presumptive test for blood. Blake described the chemical reaction that caused the Hemastix to change color in the presence of blood. RT 495-96. Keane did not cross-examine Blake about his Hemastix testimony.

Keane's argument tried to discredit Ihle's testimony about the Hemastix test by reiterating the facts that Ihle was not a chemist and that the blood might not have been human blood. Keane also argued that the Ihle's failure to save the Hemastix suggested that the police were careless with the Coleman case in other ways. RT 733-34.

The prosecutor referred to the Hemastix test and the bloody fingerprint during his opening and closing arguments. He noted that Ihle was not a chemist but that he relied on the test as a tool for determining the presence of blood. RT 692-93. He repeated that the test was "selective for blood." RT 693. The prosecutor used the bloody fingerprint evidence to argue that Coleman covered the victim's mouth to silence her while she was struggling before her death. RT 694. "The bloody fingerprints graphically illustrate at the time, over three years ago, bloody prints written right there. . . . Russell Coleman, Ladies and Gentlemen, Russell Coleman placed his bloody print on the back of his chair. . . . He left his calling card. He left his calling card in blood." RT 695-96.

During closing, the prosecutor again relied on the bloody fingerprint to identify Coleman as the perpetrator:

> [Shirley Hill] ran into that man over there, Russell Coleman, and he ended the life of Shirley Hill. Russell Coleman destroyed the life of [Hill's husband and son]. Russell Coleman did that, ladies and gentlemen, not some mysterious person walking outside. Russell Coleman, Russell Coleman, whose fingerprints we have in blood, Russell Coleman, whose fingerprint in blood is on this chair. That is the person who is guilty of the rape, of the sodomy, and of the strangulation murder of Shirley Hill.

RT 767.

On direct appeal, the California Supreme Court concluded that the Hemastix testimony should not have been admitted. The court held that the prosecution had not provided adequate foundation about the reliability of the test. On the facts of this case, however, the court found the error harmless. The court held that the Hemastix evidence "did not point to defendant as the perpetrator of the murder." The jury was aware of the limitations of the test and of Ihle's testimony. The court also concluded that the other evidence against Coleman -- the fingerprint and serological evidence and the fact that he had initially lied about ever having been at the crime scene -- was "quite substantial." Coleman, 46 Cal.3d at 773-75. But see id. at 789-91 (dissenting opinion of Broussard, J.) (Hemastix evidence was non-cumulative, "given substantial attention at trial" and not outweighed by other strong evidence of guilt).

B. Analysis

1. Confrontation Clause

The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right to confront witnesses against him. The right to confrontation applies to state criminal proceedings. Pointer v. Texas, 380 U.S. 400 (1965). The Confrontation Clause ensures that neither a rule nor the trial court will improperly restrict a defendant's opportunity for effective cross-examination. See, e.g., Kentucky v. Stincer, 482 U.S. 730, 738 (1987); Delaware v. Fensterer, 474 U.S. 15, 20 (1985).

Cross-examination, in turn, is "essentially a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial." Stincer, 482 U.S. at 737. A petitioner states a Confrontation Clause violation by showing that he was prevented from engaging in otherwise appropriate cross-examination designed to expose to the jury facts from which it could appropriately draw inferences about a witness' reliability. See Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986). The purpose of confrontation is generally satisfied if the defendant has a full and fair opportunity to explore and develop for the jury the flaws in a witness' testimony. See Fensterer, 474 U.S. at 22.

Confrontation and cross-examination, like discovery, promote reliability and accurate fact-finding in criminal trials. See Stincer, 482 U.S. at 736; United States v. Nobles, 422 U.S. 225, 231 (1975); Wardius v. Oregon, 412 U.S. 470, 473 (1973). Yet the Confrontation Clause does not require the prosecution to disclose all information that might help the defense prepare for trial. Pennsylvania v. Ritchie, 480 U.S. 39, 53 (1987) (plurality opinion). "[T]he Confrontation Clause guarantees only an opportunity for effective cross-examination, not cross- examination that is effective in whatever way, and to whatever extent, the

defense might wish." Fensterer, 474 U.S. at 20 (emphasis in original).

Coleman argues that the prosecutor's failure to disclose highly relevant evidence, in violation of a discovery order, prevented him from adequately preparing his defence. Because Ihle's testimony came as a surprise, Coleman contends, he did not have an adequate opportunity to confront Ihle. Without notice that the Hemastix test had been done, Keane could not have cross-examined Ihle effectively and exposed basic flaws in his testimony, according to Coleman.

Assuming that the prosecutor violated the discovery order,[16] the court nevertheless concludes that Coleman's

16. It is not clear, under state law, whether the discovery order applied to the fact or results of the Hemastix test. Respondent contends, however, that this court must accord a presumption of correctness to the trial court's finding that the prosecution provided Coleman with adequate discovery and notice.

This court disagrees. The trial court never made a finding about the adequacy of the prosecution's disclosure of the Hemastix test. There are thus no state-court findings of fact about discovery or notice of the Hemastix test that this court must presume correct. In fact, the parties do not dispute that the defense was never informed orally or via police reports that a Hemastix test had been done.

The trial court did find that Keane had sufficient discovery and notice as to the bloody fingerprints. It found adequate notice based on the chair back, a 1980 report from a Department of Corrections psychologist and a transcript of a taped police interview with Coleman. See RT 369, 391.

This finding rests on dubious grounds. First, although the chair back was apparently made available for discovery, Ihle testified at the preliminary hearing that there were no bloody fingerprints at the scene. 3/5/80 RT at 27. Ihle's incorrect testimony reasonably could have led Keane to believe that there was no reason to examine the chair back, since the print itself had been removed and examined by his expert.

Second, the transcript that the trial court referred to provides, at best, a very ambiguous reference to a bloody fingerprint. During a police interview, which the prosecutor transcribed and provided to

Sixth Amendment right to confront adverse witnesses was not violated. Coleman had and exercised the opportunity to confront and cross-examine Ihle at trial. See Chaussard v. Fulcomer, 816 F.2d 925 (3rd Cir. 1987) (no Confrontation Clause violation when police destroyed records of hypnosis of key witness; defendant cross-examined witness and hypnotist at trial); cf. Orndorff v. Lockhart, 707 F.Supp. 1062, 1066 (E.D. Ark. 1988), rev'd on other grounds 906 F.2d 1230 (8th Cir. 1990) (Confrontation Clause violated when defense did not learn until after trial that key witnesses had been hypnotized). Nothing the prosecution or the trial court did prevented him from cross-examining Ihle to expose any flaws in his testimony. See Stincer, 482 U.S. at 740 (Confrontation Clause not violated when defendant was excluded from hearing on a witness' competency because exclusion from

Keane before trial, inspector Schneider told Coleman, "Your fingerprints are in Mission High School in a bungalow where this girl was murdered in blood." RT 363 (transcribed incorrectly as "Your fingerprints are in Mission High School, where this girl's fingerprints are -- murdered in bed"); see also Trial Ex. 39 at 4 (transcript); RT 551, 707. Keane knew that Ihle had testified that there were no bloody fingerprints, and he knew there had been very little blood at the scene. See 3/5/80 RT at 28; RT 153. So even if the transcript did suggest that Coleman's fingerprints were bloody, Keane reasonably could have disregarded the comment, as he contended he had. RT 363.

Finally, the trial court concluded that Keane had notice of the bloody print from a January, 1980 report from a Department of Corrections psychologist. RT 391. The report does not mention fingerprints or blood; thus, it could not have given Keane notice about the bloody fingerprint. See Ex. LL.

Because the record does not support the trial court's findings about notice and discovery of the bloody fingerprints, this court need not presume them correct. See 28 U.S.C. § 2254(d)(8); Gholson v. Estelle, 675 F.2d 734, 738 n.2 (5th Cir. 1982) (district court properly refused to adopt findings of state habeas court that were not adequately supported by the record).

hearing did not interfere with his opportunity for cross-examination at trial); Van Arsdall, 475 U.S. at 680. The trial court allowed Keane to voir dire Ihle outside the presence of the jury. RT 369-87. At Keane's request, Ihle repeated the Hemastix test in chambers. RT 394-96. The trial court did not limit cross-examination of Ihle in any way. RT 413-23. Any flaws in Keane's cross-examination cannot be attributed to a Confrontation Clause violation.

2. Due Process

Criminal defendants are constitutionally assured "a meaningful opportunity to present a complete defence." California v. Trombetta, 467 U.S. 479, 485 (1984). The guarantee arises from either the Confrontation Clause or the Due Process Clause. See United States v. Lopez-Alvarez, 970 F.2d 583, 588 n.4 (9th Cir. 1992). The guarantee applies to criminal defendants in state court. See Trombetta, 467 U.S. at 485. It may be violated when a defendant is prevented from presenting evidence important to his defense. See, e.g, id. at 488-89 (failure to preserve breath samples that might have provided grounds for impeachment); Lopez-Alvarez, 907 F.2d at 588 (limitation on cross-examination of prosecution witness about hearsay statements that could have cast doubt on his credibility); see also Gilmore v. Taylor, 113 S. Ct. 2112, 2118 (1993) and cases cited therein.

A defendant may be denied the opportunity to present a complete defense if the prosecution fails to disclose key evidence that it later introduces at trial. The defendant suffers prejudice in such situations because he cannot adequately prepare a defense to evidence of which he is unaware. The prejudice is greater when the prosecution had led a defendant to believe that such evidence does not exist. See, e.g., United States v. Tamura, 694 F.2d 591, 598-99 (9th Cir. 1982); United States v. Roybal, 566 F.2d 1109, 1110 (9th Cir. 1977).

"Under certain circumstances, the late disclosure even of inculpatory evidence could render a trial so fundamentally unfair as to violate due process." Lindsey v. Smith, 820 F.2d 1137, 1151 (11th Cir. 1987); see also Smith v. Estelle, 602 F.2d 694, 699-701 (5th Cir. 1979) (due process and Eighth Amendment violation where prosecution surprised defendant at penalty phase with psychiatric witness who testified about future dangerousness).

On the other hand, several Ninth Circuit cases have found no due process violation when the prosecution reveals exculpatory evidence late but before the end of the trial. Due process is not violated, for example, when the prosecution delays disclosure but tells the defendant about the evidence at a pre-trial conference. See Reiaer v. Christensen, 789 F.2d 1425, 1432 (9th Cir. 1986). Similarly, a prosecutor who learns about material evidence during the trial may comport with due process if he discloses the evidence immediately and the defendant has a fair opportunity to prepare for the evidence. See e.g., Thomas v. Goldsmith, 979 F.2d 746, 748 (9th Cir. 1992); United States v. Browne, 829 F.2d 760, 765 (9th Cir. 1987).

In the instant case, the court does not condone the conduct of the prosecution. The facts suggest that the prosecution was not as forthcoming as it could have been -- and probably should have been -- about the Hemastix test, if not the bloody fingerprints. It is undisputed that the prosecution did not disclose the fact of the test, or any attempts to conduct confirmatory tests, to Coleman's counsel. Ihle reported the Hemastix test only in discussions with the prosecution team; he did not make a written record of the test or save the test strip. No police report suggested that the police crime laboratory had tried, unsuccessfully, to test the fingerprint further for the presence of blood. Ihle did not note on the lift card that the fingerprint tested positive for blood, as was his practice. Cf. Trombetta, 467 U.S. at 488 (no bad faith

where officers destroyed breath sample according to their usual practice); Mitchell v. Goldsmith, 878 F.2d 319, 322 (9th Cir. 1989) (no bad faith where police destroyed semen sample pursuant to department procedures). Ihle did write "bloody prints" on the chair back, but -- again contrary to his usual practice -- he wrote it on the opposite side of the chair back from the side he tested with the Hemastix. None of the crime-scene photographs shows the chair back with "bloody print" on it. Ihle testified at the preliminary hearing that there were no bloody fingerprints at the scene, and the prosecutor did not correct his testimony.[17] See Napue v. Illinois, 360 U.S. 264 (1959) (prosecutor has due-process duty to correct testimony of government witness that he knows to be false); United States v. Poole, 379 F.2d 645, 646-47 (7th Cir. 1967) (due process violated where prosecution did not correct false preliminary hearing testimony about source of undisclosed report favorable to the defense).

On the facts of this case, however, the court concludes that the prosecution's conduct did not rise to the level of a due process violation. Had Keane examined it, the chair back would have alerted him to the bloody fingerprints and might have led him to question Ihle about

17. James Lassart, the prosecutor at the preliminary hearing, knew that the Hemastix test had been done. He did not raise the issue, he said, because "it was not confirmed that the substance on the chair was human blood" and because Coleman's fingerprints and his "inconsistent denial and later admission of his presence, at the classroom around the time of the killing, was sufficient to obtain a holding order against him." Lassart depo., Petitioner's Ex. 1 (1990 Lassart declaration).

Lassart's recollection on this point may not be accurate. As respondent points out, until Coleman testified at trial, he denied that he had been at the crime scene. See RT 594. Thus, Coleman's admission -- for the first time -- at trial that he had been at the scene could not have affected Lassart's rationale for not correcting the preliminary hearing testimony.

his basis for believing they were bloody. When Keane actually became aware of the bloody fingerprint and the Hemastix test, the court offered him the opportunity to question Ihle outside the jury's presence. See Thomas, 979 F.2d at 748 (no due process violation where court allowed defendant to interview undisclosed rebuttal witness before he testified). As noted above, Keane had and exercised the opportunity to cross-examine Ihle about his qualifications to conduct the Hemastix test and its reliability. See LaMere v. Risley, 827 F.2d 622, 625 (9th Cir. 1987) (no due process violation where defendant had opportunity to use undisclosed material at trial); cf. United States v. Martin, 984 F.2d 308, 311-12 (9th Cir. 1993) (court denied due process at parole revocation hearing by admitting test results where defendant had no opportunity to cross-examine tester or retest sample himself). Keane also could have confronted Ihle with his inconsistent preliminary hearing statement about the bloody fingerprints. See Machin v. Wainwright, 758 F.2d 1431, 1434 (11th Cir. 1985) (due process not violated when rebuttal witness testified about defendant's statement that prosecution had not disclosed; counsel could have learned of it from the defendant and impeached the witness with his inconsistent deposition testimony).

Coleman now offers expert opinions that he claims would have strengthened his confrontation of the Hemastix evidence at trial. Cf. Lindsey, 820 F.2d at 1151 (habeas relief denied for late disclosure of inculpatory evidence where petitioner did not suggest how the evidence could have been more effectively impeached had it been properly disclosed). Criminalistics expert Patricia Zajac testified at the evidentiary hearing that the Hemastix test, as done by Ihle, was unreliable because it lacked positive and substrate controls. 4/15/94 EH at 39. Even with the controls, according to Zajac, the test is not selective for blood; it may produce a positive result for

many other common substances as well. Id. at 41, 73-74, 77. Dr. Jesus Botero, a representative of the company that manufactures Hemastix, agreed that Ihle performed the test in an unreliable manner and that substances other than blood would produce a positive result. He noted that Hemastix has been approved for testing for the presence of blood in fresh urine only." Ex. 38. Coleman argues that the failure to disclose the Hemastix test prevented him from adequately impeaching Ihle's testimony, which he could have done by presenting experts such as Zajac and Botero.

Coleman has established that Keane could have obtained expert testimony that would have allowed him to confront the Hemastix evidence more effectively. This facts alone, however, does not establish a violation of due process. Neither the prosecution nor the trial court denied Keane the opportunity to seek or present this type of evidence. When he actually learned about the Hemastix, Keane could have asked for a continuance to consult an expert or develop expert testimony, but he did not. 3/23/94 EH at 138; see Reiger, 789 F.2d at 1432 (no due process violation for late disclosure of fingerprint evidence where counsel did not request continuance or seek to investigate the test). Had he done so, he presumably could have countered the Hemastix evidence as effectively -- despite the late disclosure -- as if he had been told about the test during discovery.

On these facts, the court concludes that the prosecution's failure to disclose the Hemastix test did not violate due process[18]

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18. Coleman also argues, in a footnote, that admission of the bloody-fingerprint evidence violated the Eighth Amendment because it was unreliable. The case he cites, however, address the reliability of the statutory procedures under which a capital conviction and sentence are imposed. See Beck v. Alabama, 447 U.S. 625, 637-38 (1980); Lockett v. Ohio, 438 U.S. 586, 604 (1978). As discussed above, the procedures relating to the introduction of the Hemastix testimony did not render the evidence constitutionally unreliable.

4. Guilt-phase ineffective assistance of counsel

Petitioner points to three specific errors as a basis for his claim that he was denied his Sixth Amendment right to effective assistance of counsel at the guilt phase of his trial. He claims that Keane's failures in these areas undermine confidence in his capital conviction. Respondent argues that Keane provided competent assistance, and any deficiencies did not prejudice Coleman.

To prevail on a claim of ineffective assistance of counsel, petitioner must show both that counsel's performance was deficient and that he was prejudiced by the deficiency. See Strickland v. Washington, 466 U.S. 668, 687 (1984). The court must analyze the reasonableness of counsel's performance deferentially, considering the circumstances of the case at the time of counsel's conduct. Id. at 688, 690. "[C]ounsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." Id. at 690. To this end, counsel must either conduct a reasonable investigation or make a reasonable decision that renders additional investigation unnecessary. Id. at 691.

To establish prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. In evaluating prejudice, the court must consider the sum of the evidence and assume that the jury fairly and objectively applied the appropriate law. Id. at 694-95.

This order first analyzes Keane's performance with respect to each of the three alleged errors. Then it

considers whether it is reasonably likely that any deficiencies, considered in light of the evidence before the jury, affected the outcome. See Harris by and through Ramseyer v. Wood, 64 F.3d 1432, 1439 (9th Cir. 1995) (cumulative prejudice analysis appropriate).

A. Counsel's performance

1. Hemastix test

Petitioner argues that Keane failed adequately to investigate and confront the Hemastix test. Specifically, he points to Keane's failure to inspect the chair back and, upon learning of the Hemastix test, to consult an expert. Respondent answers that petitioner cannot show prejudice and that Keane acted competently with regard to the Hemastix test.

The court is troubled by Keane's failure to inspect the chair back.[19] See, e.g., Sanders v. Ratelle, 21 F.3d 1446, 1460 (9th Cir. 1994) (counsel ineffective, in part for not familiarizing himself with the physical evidence); Sims v. Livesay, 970 F.2d 1575, 1580-81 (6th Cir. 1992) (counsel ineffective for not conducting independent investigation of physical evidence). In this case, however, the court cannot say that Keane acted unreasonably. Keane had an expert examine a lift of Coleman's fingerprint taken from the chair back; as far as Keane knew, the chair back had little

19. The ABA standards state that a defense attorney's "investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities." See ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 4-4.1 (Approved Draft 1971). Strickland notes that these standards provide guidance in assessing the reasonableness of counsel's conduct. See Strickland, 466 U.S. at 688. The prosecutor himself recognized that "it would be so unlike [Keane's] competent practice" if he had not inspected all the physical evidence. Lassart depo. at 43; see also 4/7/94 EH at 37 (Strickland expert Thomson).

evidentiary value aside from Coleman's fingerprint.[20] Nothing in the preliminary hearing or the discovery materials suggested that the print had tested presumptively positive for blood.[21] Given what he knew pre- trial, Keane took reasonable steps to investigate the fingerprint. See Ames v. Endell, 856 F.2d 1441, 1444 (9th Cir. 1988) (the extent of counsel's duty to investigate depends on the facts he knows). But see 4/7/94 EH at 36-37 (opinion of Strickland expert Thomson that Keane had absolute duty to view physical evidence).[22]

Coleman also argues that Keane responded unreasonably to the Hemastix testimony when it was introduced at trial. As discussed in more detail above, Keane took steps first to exclude and then to challenge the Hemastix evidence. He believed, and argued vigorously to the trial court, that Ihle's testimony about the Hemastix was unreliable and should not be admitted. RT 388; see also 3/23/94 EH at 138-39, 148. After the trial court overruled his objections, Keane cross-examined Ihle

20. Keane would have known from the preliminary hearing transcript that Ihle also found an unidentified fingerprint on the chair back. See Preliminary hearing transcript at 29, 31.

21. As discussed above, the prosecution was not entirely forthcoming with information about the fingerprint evidence. The prosecution may, in certain circumstances, "so materially interfere[] with the defendant's ability 'to require the prosecution's case to survive the crucible of meaningful adversarial testing' as to raise a presumption that the defendant's counsel could not have been able to provide effective assistance as required by the Sixth and Fourteenth Amendments." Blake v. Kemp, 758 F.2d 523, 532-33 (11th Cir. 1985) (citing United States v. Cronic, 466 U.S. 648, 656 (1984)). For the reasons discussed above, however, this is not such a case.

22. The court has difficulty giving much weight to the testimony of Strickland expert Thomson. In the court's opinion, Thomson tended to espouse unrealistic standards for trial counsel; he came across more as an advocate for Coleman's position than as an independent expert on whose opinion the court could properly rely.

about his knowledge of the Hemastix test. He established that Ihle knew nothing about its accuracy or whether it would react to a number of substances other than blood or whether the fingerprint powder used to lift the prints had some effect on the test.[23] RT 413-17; see also RT 692-93 (prosecutor's argument), 733 (Keane's argument). He also established that Ihle had performed the test out of the presence of the jury on the same brown smudges" and got no reaction and then at the prosecutor's request performed the test again and got no reaction. RT 417-418. Ihle also acknowledged that he had not confirmed the presumptively positive Hemastix test. RT 423. In addition, Ihle admitted that he could not tell by looking that the brown stain on the chair back was blood and that the only blood that he did identify by sight was fresh and had not dried. RT 416.

Keane offers no strategic reason for not consulting and calling an appropriate expert. See 3/23/94 EH at 73. Under the circumstances, however, he reasonably could have concluded that his cross-examination had sufficiently weakened Ihle's Hemastix testimony. But see 4/7/94 EH at 200-01 (Thomson states that counsel cannot make informed decision about whether to minimize testimony without consulting expert). Thus, Keane did not act unreasonably by not consulting and presenting the testimony of an expert.

"There are countless ways to provide effective assistance in any given case." Strickland, 466 U.S. at 689; Kimmelman v. Morrison, 477 U.S. 365, 386 (1986). Keane certainly could have done more to counter the surprise

23. On direct examination, Ihle testified that the Hemastix was designed to test for blood in urine and that it could not determine whether the blood was from a human or animal. See RT 406-08, 414, 417, 496; see also RT 692-93, 697 (prosecutor's argument), 733 (Keane's argument). But see RT 693 (prosecution said in argument that Blake considered Hemastix "a very selective and accurate tool").

Hemastix testimony.[24] But this court must not measure counsel's conduct by whether he did all he possibly could have done. Instead, it must apply a "highly deferential" standard of review to determine whether his conduct was unreasonable. Kimmelman, 477 U.S. at 381. Under this standard, the court holds that Keane's conduct was sufficient "to make the adversarial testing process work." Strickland, 466 U.S. at 690. His performance with respect to the Hemastix testimony was not constitutionally deficient.

As Coleman has not satisfied the deficient-performance prong of Strickland, the court need not consider whether Coleman was prejudiced by Keane's failure to consult and present a Hemastix expert. See Strickland, 466 U. S. at 697.

24. Had Keane consulted experts and presented their testimony at trial, the jury would have heard that many common substances other than blood -- including bacteria, cleaning supplies, plant extracts and metal oxides -- may produce a positive result on the Hemastix test. It would have heard that Ihle did not conduct either a positive control (against a known blood sample) or a substrate control (against another part of the chair back). Without such controls, according to the habeas expert, the Hemastix test could have identified as blood what was in fact one of these other common substance. 4/15/94 EH at 34-40; see also Clark v. Moran, 942 F.2d 24, 33 (1st Cir. 1991) (erroneous admission of presumptive blood test was harmless; counsel "discount[ed] the effect of the tent results by exposing the need for a confirmatory test and exploring the possibility of false positives"). The jury might also have learned, however, that the Hemastix is recognized by experts as a presumptive test for blood and that, although it is generally used to test for the presence of blood in urine, it should also react to dried blood. 4/15/94 EH at 35, 37, 69, 76. The presentation of an expert might also have highlighted the fact that Coleman's fingerprint may have been left in blood.

2. Serological evidence

Petitioner claims that Keane rendered ineffective assistance by failing adequately to investigate or confront the serological evidence presented by the prosecution. Specifically, he argues that Keane should have obtained the laboratory notes and raw data of the prosecution's serology expert that explained which tests he did and how they were conducted. Respondent contends that Keane's performance with regard to the serological evidence was constitutionally adequate and that any deficiencies did not prejudice Coleman.

The prosecution retained forensic serologist Edward Blake to analyze the vaginal wash taken from the victim. Blake prepared two reports about the serological evidence, which were disclosed to-the defense before trial. See Exs. 41, 42. Blake's lab notes were not part of the prosecution's trial file and were not turned over to the defence. See Stipulation re: Laboratory Notes of Edward Blake. Keane gave a copy of the reports to his investigator on the case, Russell Stetler, who interviewed Blake, researched the issues and prepared a summary of the tests, the results and his conversation with Blake. See Ex. E at 28-36, 39- 40, 69-70, 496-501.

Stetler also delivered copies of Blake's serological reports to Brian Wraxall, a defense serological consultant, approximately month before the trial began. See 3/22/94 EH at 47; 3/23/94 EH at 87-88; Ex. E at 5, 8. Wraxall did not ask for or receive Blake's notes. See Wraxall depo, at 20. Keane had two brief conversations with Wraxall to prepare himself to cross-examine. Blake. 3/23/94 EH at 88; Ex. 3; Wraxall depo. at 9, 20; Wraxall stipulation. Wraxall was not available to testify at trial. Keane did not

consult anyone else about the serological evidence.[25] 3/23/94 EH at 88.

Blake testified at trial about his serological analysis.[26] He found that the victim, Shirley Hill, had type A blood and was PGM type 1/1 and a non-secretor.[27] See RT 501; Ex. 41. Analyzing the fluid taken from her vaginal cavity in light of these facts about Hill, Blake concluded that the donor of the semen must have been a non-secretor with PGM type 2/1 or 2/2. See

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25. Keane testified that he did not consider consulting another expert (see 3/23/94 EH at 88), but the record suggests otherwise. Keane's only questions for Blake on re-cross- examination were about Wraxall's reputation in the scientific community. RT 529-30. The following court day, Keane or someone from the defense team contacted Wraxall's colleague. Wraxall depot at 20-21. Taken together, these facts suggest that Keane had at least thought about calling Wraxall (or his colleague, since Wraxall was unavailable) to testify.

26. At Keane's request, the trial court held a hearing, outside the presence of the jury, to determine the admissibility of Blake's testimony. See RT 438-62. Keane then argued that his testimony should be excluded as a sanction for Blake's destruction of the semen sample that, if properly tested, could have eliminated Coleman as the source of the semen. RT 485; see People v. Hitch, 12 Cal.3d 641, 652 (1974) (sanctions appropriate when prosecution breaches its duty to preserve material evidence). The trial court held that Blake's testimony would be admitted, agreeing with the prosecutor that Blake properly used his judgment in testing the sample, even though it was consumed in the process. RT 486-87. Blake's testimony at the in camera hearing was similar to his testimony before the jury.

27. These results represent three independent classifications based on three different tests of human body fluids. Type A is one of three types of antigens in the ABO blood-typing system. People can also be classified as secretors or non-secretors, depending on whether they secrete ABO antigens into their body fluids, such as saliva and semen. Blood and body fluids can also be categorized as one of three types based on the genetically variable enzyme phosphoglucomutase (PGM): 1/1, 2/1 or 2/2.

RT 505-06; Ex. 41. A test of Coleman's blood and saliva, taken after his arrest, showed that he is a non-secretor with PGM type 2/1 and type O blood. See RT 507; Ex. 42.

Blake then told the jury that studies had established that 20 percent of the population are non-secretors, and 40 percent have PGM type 2/1 or 2/2. RT 510-11. Based on these statistics, Blake testified that Coleman was included in the eight percent of the male population that could have supplied the semen found in Hill's vaginal cavity. RT 511.

Blake also testified that Hill's ex-husband, Richard O'Neal[28], could be excluded as the source of the semen. Although he, like Coleman, had PGM type 2/1, O'Neal was a secretor. If his semen had been in Hill's vagina, his type-B' antigens would have been present in the vaginal wash that Blake examined. See RT 510.

On cross-examination, Keane established that Blake could have done other tests to narrow further or eliminate Coleman as the source of the semen. See RT 521; see also RT 616-17 (when questioned about his procedures by a defense investigator, Blake was surprised that he had not done a peptidase A test on the vaginal wash). He elicited testimony that Blake's testing consumed all of the vaginal wash sample. See RT 522. Keane also tried to analogize the serological factors on which Blake based his conclusions to curly hair and glasses. See RT 512-14, 518-20, 761; see also 688 (prosecution argument), 738-39 (defense argument).

The prosecutor referred to Blake's serology testimony during his opening and closing arguments. See, e.g., RT 689, 761-63. Keane's argument emphasized that the serological evidence merely limited the pool of possible semen donors to five million people. Noting that O'Neal and Coleman had the same PGM type, Keane also

28. The trial transcript refers to Hill's husband as both "O'Neal" and "O'Neill."

suggested that the semen found in Hill at the time of her death had come from O'Neal. See RT 737.

As with the Hemastix evidence, it is clear that Keane could have done more. At the evidentiary hearing, Coleman offered additional evidence that Keane could have developed to undermine Blake's serological conclusions. This evidence challenges his conclusions about both the PGM status and the non-secretor status of the semen donor.[29] With this evidence, Keane could have argued to the trial court that Blake's testimony

29. First, Coleman questions the reliability of Blake's determination that the donor was a PGM type 2. Because Blake did not photograph the results of the PGM test on Hill's blood sample or confirm them with another expert, Coleman argues, he could not reliably establish that she was PGM type 1. See, e.g., 3/23/94 EH at 22-23; 3/24/94 EH at 137; Sensabaugh depo. at 53-55; Henke depo. at 118; Zajac depo. at 72-73; see also Grubbs v. Hannioan, 982 F.2d 1483, 1488-89 (10th Cir. 1993) (defence expert's failure to duplicate or corroborate PGM test or offer detailed testimony about the gathering and preservation of the semen sample and the reliability of the PGM test rendered serological evidence uncertain). Without a reliable finding of her PGM status, Blake could not have concluded reliably that the semen donor, and not Hill herself, supplied the PGM type 2 body fluid-d found in the vaginal wash.

Second, Coleman challenges the process Blake used to conclude that the semen donor was a non-secretor. He points to several flaws: 1) no positive or negative controls; 2) no duplicate or confirmatory tests; 3) possible degradation or contamination of the vaginal wash sample. One of his habeas experts also contends that Blake's non-secretor conclusion was unreliable because the H antigen, which corresponds to blood type O, is unstable and therefore could have been undetected by Blake's tests. See Henke depo. at 35, 38-40, 64, 79, 91-94. In addition, Coleman suggests that the non-secretor finding may be misleading because Blake could not accurately estimate the quantity of semen in the vaginal wash. Thus, the absence of secreted antigens in the sample could have been caused by an insufficient quantity of semen, rather than a sufficient quantity of semen from a non-secretor, as Blake concluded. See, e.g., 3/22/94 EH at 84, 89-90, 152-54 (Pereira); 3/24/94 EH at 75-76 (Blake); Exs. 127-34; Sensabaugh depo. at 74-81.

should be excluded as scientifically unreliable, according to Coleman. Had that argument failed, Keane could have presented the jury with expert testimony to raise doubts about the serological evidence presented by Blake.

On the facts of this case, however, the court cannot conclude that Keane's performance with respect to the serological testimony fell outside the "wide range of professionally competent assistance." Strickland, 466 U.S. at 690. But see 4/7/94 EH at 58-99, 201-06; 4/11/94 EH at 25-38, 60-71, 92-93 (Thomson). He had his investigator interview Blake and research his results. He consulted Wraxall, an independent expert, to prepare for his cross-examination of Blake. He objected to Blake's testimony, and he cross-examined Blake.

The court thus concludes that Keane's performance with respect to the serological evidence was constitutionally adequate. As with the Hemastix evidence, the court need not consider whether Coleman was prejudiced by Keane's conduct with respect to the serology evidence. See Strickland, 466 U.S. at 697.

3. Hair report

Petitioner also contends that Keane failed to investigate or present to the jury a report by the prosecution's criminalist that hair found in the victim's hand was "inconsistent" with Coleman's hair. Respondent does not argue that Keane acted competently with regard to the hair report; instead, he argues that Keane's failures did not prejudice Coleman.

Many of the facts relating to this claim are undisputed. See Joint Pretrial Statement at 3-5, filed 1/7/93. Before the trial, criminalist Robert Ogle conducted for the prosecution two separate analyses of hair found at the crime scene. From the first analysis, in 1979, Ogle concluded that hairs found in the victim's pubic area could not be distinguished from the victim's hair. See Ex. 41.

Keane received from the prosecution a copy of Ogle's report summarizing this conclusion.

Ogle's second hair analysis, in 1980, compared a fragment of human hair found in the victim's hand with hair samples taken from Coleman.[30] In his report of this analysis, Ogle stated that the hair fragment was "consistent with negroid hair" but "inconsistent" with Coleman's hair. Because the unknown hair was just a fragment, however, Ogle concluded that Coleman "cannot be definitely eliminated as the source of the questioned hair." See Ex. 40; Ogle depo. at 24-27.

The prosecution delivered a copy of the 1980 Ogle report to Fred Anderson, an investigator with the San Francisco public defender's office, which represented Coleman. Anderson initialed discovery stamp on the back of the report. Neither Keane nor co-counsel McElroy nor Russell Stetler, the outside investigator working on Coleman's case, saw a copy of this report before trial.[31]

During the prosecution's case, prosecutor Fazio wrote Ogle's address and phone number on a copy of the report and showed it to defense co-counsel McElroy. See Ex. V; Fazio depo. at 37-40; McElroy depo. at 29-32; RT 557. McElroy apparently did not recognize the significance of the report or show it to Keane. McElroy depo. at 32.

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30. According to a police report, physical evidence taken from the crime scene included "Possible fiber & hair fingers of victim's right hand." See Ex. 5. The hair apparently was presented to Ogle on a slide that also contained three other hairs, probably from a cat, and a piece of wool fiber. See Exs. 6, 40. Ogle compared the hair, which was very contaminated, with more than 50 hairs taken from seven different locations on Coleman's body. See id.; Ogle depo. at 16-18.

31. Coleman initially raised a Brady claim that the prosecution had never turned over the report to the defence. As a result of discovery, it is now undisputed that the prosecution disclosed the report to Anderson. Coleman's claim about the hair report thus rests on his contention that trial counsel was ineffective for failing to investigate and use the report.

The following court day, the defense recalled Dr. Blake, Ogle's colleague, to the stand at the start of its case. Blake referred to a report of a hair examination done by Ogle. Keane asked Blake for a copy of the report and told the court that he had never seen it before. The parties discussed the discovery stamp, and the prosecutor stated that he had shown the report to McElroy. Keane had no further questions for Blake, and the trial continued. RT 557-58. A copy of the report was marked as an exhibit but never introduced into evidence. See RT 640.

At the evidentiary hearing, Keane testified that when he was shown the report during the trial, he assumed it was the inconclusive hair analysis he had been given during discovery. 3/23/94 EH at 84. He thus did not have the hair tested or call Ogle, as he would have done had he recognized the exculpatory potential of the report. Id. at 82-83. He did not make a strategic decision not to introduce the report. Id. at 85. Based on these facts, the court must conclude that Keane's conduct regarding the hair report was unreasonable: "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. Whether Keane failed to read the report or read the report but did not pursue or introduce it at trial, he breached his duty to investigate.

Keane argued vociferously to the trial court that he had not seen the report before trial.[32] His failure to read the report at trial is thus inexplicable. The court

32. The court has some doubts about Keane's testimony on this point. Although both reports are printed on Forensic Science Associates letterhead, they otherwise do not look much alike. See Exs. 40, 41. Also, if Keane had thought the two reports were the same, he presumably would not have told the trial court that he had not seen the supplemental hair report when Blake produced it at trial.

acknowledges the deference with which it must review trial counsel's conduct. Nonetheless, it is unreasonable for counsel in a capital case to ignore a two-page report that was handed to him, at his request, by a prosecution witness he was examining, when he insisted that he had not previously seen the report.

If, contrary to his hearing testimony, Keane did read the report when it was handed to him at trial, he performed incompetently by failing to introduce or investigate the report. He did not make a tactical decision not to present the report. He did not determine that admission of the report would open the door to harmful rebuttal evidence. See, e.g., Mak v. Blodgett, 970 F.2d 614, 618-19 and n.6 (9th Cir. 1992) and cases cited therein; cf. Harris, 913 F.2d at 628 (counsel not ineffective for not presenting psychiatrists who could be cross-examined based on "equally persuasive psychiatric opinions that reach a different conclusion"). To the contrary, the report would have supported the defense Keane presented. See 4/7/94 EH at 29-35, 189-91.

The court does not hold that trial counsel has a duty in every case to consult his own expert about every piece of forensic evidence. Its conclusion does not rely on such a broad holding. Instead, the court holds that trial counsel's constitutional duty to investigate required him, in this case, at least to read the report handed to him by the prosecution's expert and make a strategic decision whether to investigate further and/or introduce the report as evidence. Because Keane breached this duty, the court concludes that he did not provide effective assistance of counsel with respect to the Ogle hair report. The court next considers whether Keane's deficient performance prejudiced Coleman.

B. Prejudice

To evaluate prejudice, the court considers whether, if Keane had properly investigated and presented the hair evidence, there is a reasonable probability that it would have made a difference to the jury. See Williams v. Calderon, 52 F.3d 1465, 1470 (9th Cir. 1995).

> Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, [the court] must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Strickland, 466 U.S. at 696. Prejudice thus must be evaluated in light of the evidence actually presented at trial. See id. at 695.

Had Keane read and introduced the Ogle report, the jury would have learned that a prosecution expert concluded that a hair fragment found in the victim's hand was inconsistent with Coleman's hair. Had Keane consulted an independent expert, he could have presented testimony that Coleman definitely could be eliminated as the source of the hair fragment based on the comparisons that Ogle did.[33] See 4/15/94 EH at 27, 58.

The information about the hair that was not introduced would not have directly refuted the evidence presented by the prosecution. See Washington, 4 F.3d at

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33. The state now cannot find the hair fragment. Patricia Zajac, the criminalist whose expert testimony Coleman presented at the evidentiary hearing, rendered her opinion after reviewing Ogle's notes and report. The basis for her opinion was that all the sample hairs from Coleman had consistent coarse pigment clumping; the pigment granules in the hair fragment, by contrast, were finely clumped. 4/15/94 EH at 28, 58-59.

1289-90; cf. Sims v. Livesay, 970 F.2d 1575, 1580 (6th Cir. 1992). The jury still would have heard uncontradicted evidence that Coleman's fingerprints and palm print were found close to the body, that he was included within the eight percent of the population that could have left the semen found in Hill at the time of her death and that he had initially lied to the police.

The evidence presented at trial against Coleman is not so strong that it virtually precludes a finding of prejudice. Cf. Strickland, 466 U.S. at 700 (no prejudice from-failure to introduce psychological evidence at penalty phase where aggravating factors were overwhelming"); Williams, 52 F.3d at 1470 (no prejudice from failure to present additional diminished- capacity evidence where evidence of premeditation was "simply overwhelming" and "powerful"). On the other hand, the unpresented evidence about the hair fragment is not so strong that it would have been likely to change the outcome to Coleman's advantage. Cf. Sanders v. Ratelle, 21 F.3d 1446, 1461 (9th Cir. 1994) (counsel's incompetence deprive[d defendant] of the most critical evidence supporting his best defense").

The hair analysis would have tended to buttress the alibi defense that Coleman presented at trial. But the prosecution easily could have minimized its impact by arguing that the hair had come from the debris-covered floor on which Hill was killed. See RT 327 ("debris and dust and dirt" covered the entire floor, except immediately around the body). To support this theory, the prosecutor could have pointed to the cat hairs and wool fiber that were found with the hair fragment. See Exs. 5, 40. The prosecution also could have emphasized that the hair was generally "consistent with negroid hair." Ex. 40.

The court has considered the evidence that Keane could have introduced and its likely effect on the evidence presented at trial. It concludes that there is not a reasonable likelihood that the jury would have had a reasonable doubt about Coleman's guilt had Keane

investigated and used the Ogle hair report. Cf. Sanders, 21 F.3d at 1461. The probability that the hair evidence would have produced a not-guilty verdict is not "sufficient to undermine confidence in the outcome." Williams, 52 F.3d at 1470 (quoting Strickland, 466 U.S. at 694).

Because Keane's performance was for the most part constitutionally adequate and because his failings did not prejudice Coleman, the court denies habeas relief on Coleman's claim of ineffective assistance of counsel in the guilt phase.

5. Autopsy photographs

Coleman claims that the trial court violated due process by admitting gruesome, irrelevant photographs of the victim. Respondent denies that a constitutional violation resulted from the admission of the photographs.

Keane objected to the admission of several photographs, both black and white and in color, on the grounds that they had no probative value and that they were unnecessarily gruesome. The prosecution argued that the photos were probative because they corroborated the coroner's testimony and were not unduly inflammatory.[34] The trial court overruled defense counsel's objection and admitted the photos. RT 76-78. On direct appeal, the California Supreme Court agreed that the photographs were probative and not unusually gruesome. Coleman, 46 Cal.3d at 776.

In a habeas proceeding, this court will not find a due process violation unless admission of the photographs rendered the trial fundamentally unfair. See Kealohapauole v. Shimoda, 800 F.2d 1463, 1466 (9th Cir. 1986). In Kealohapauole, the Ninth Circuit held that a

34. The prosecution also rejected Keane's offer to stipulate to the cause of death and the autopsy report in exchange for exclusion of the photographs. RT 77-78.

videotape of an autopsy performed on the murder victim was probative on the issue of the cause of death and not unduly gruesome. Admission of the tape thus did not deprive the petitioner of a fair trial. Id. at 1466. "Unless fundamental fairness is abridged, federal court interference is unwarranted." Id. at 1465.

In the instant case, the photos are unpleasant but not inflammatory or gruesome. They have probative value: They show the position of the victim's body in relation to the window and chair where Coleman's prints were found. They also show the injuries inflicted during the assault and the position in which the body was found. The prosecution used the photos to corroborate the coroner's testimony and to assist the criminologist with his testimony.

For these reasons, the court concludes that admission of the photographs did not render Coleman's trial fundamentally unfair. This claim is therefore denied.

6. Jury-selection error

Coleman contends that the trial court violated his right to due process and an impartial jury when it denied his motion to remove for cause four prospective jurors who indicated that they would automatically vote for the death penalty. Respondent answers that the prospective jurors responded equivocally to questions about whether they would automatically sentence Coleman to death. He also argues that this claim fails under federal law because Coleman did not exhaust his peremptory challenges.

A juror may be excused for cause if his views on capital punishment "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, 469 U.S. 412, 424 (1985) (internal quotations omitted). Here, however, the prospective jurors whose views Coleman is questioning did not sit on Coleman's jury. None of the venire members he challenged for cause sat on his jury.

Coleman does not argue here that any of the jurors who actually convicted and sentenced him were partial or incompetent.[35] "So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." Ross v. Oklahoma, 487 U.S. 81, 88 (1988); see also Siripongs v. Calderon, 35 F.3d 1308, 1322 (9th Cir. 1994).

Nor did the trial court violate due process by arbitrarily denying Coleman the peremptory challenges that he used to remove the jurors who should have been removed for cause. "[T]he right to peremptory challenges is denied or impaired only if the defendant does not receive that which state law provides." Ross, 487 U.S. at 89 (internal quotation marks omitted). Coleman does not argue that the trial court denied him the peremptory challenges to which he was entitled under state law. In fact, he did not exercise all the peremptories that he had. "[T]he loss of peremptory challenges is not a due process violation." Siripongs, 35 F.3d at 1322.

This court thus denies habeas relief as to Coleman's claim about the selection of his jury.

7. Incompetent juror

Coleman claims that he was denied his right to due process and to a jury of 12 competent, unbiased jurors because the foreman of his jury, Charles Barlean, was a convicted felon. Specifically, he argues that the state violated federal constitutional guarantees of due process by denying him his state-created right to 12 non-felon jurors. He also argues that his rights under the Sixth and Fourteenth Amendments were violated because Barlean did not disclose his ex-felon status and the state did not

35. Coleman's claims of jury misconduct are addressed below.

allow him a hearing to establish prejudice once he found out.

Respondent answers that Coleman's due process claim is not cognizable on federal habeas review because Coleman has no absolute right, under state law, to a jury of 12 non-felon jurors. Thus, he argues, state-law provisions for keeping ex- felons off juries do not implicate federal due process concerns. Respondent contends that Coleman's claim under the Sixth and Fourteenth Amendments fails as a matter of law because Coleman has not alleged and cannot show prejudice.

The material facts are not in dispute. Jury foreman Charles Barlean had been convicted of and imprisoned for at least three felonies at the time he served on Coleman's jury.[36] See Ex. E, Exhibits Attached to Court Ordered Briefing on the Merits of the Charles Barlean and Verda New Claims [Barlean/New Exhibits]. He did not know that ex-felons were ineligible for jury duty. Barlean depo. at 11.

The questionnaire sent to prospective jurors at the time apparently asked whether the juror-candidate had "ever been convicted of malfeasance in office or of any felony." Ex. A attached to Barlean Depo; Ex. D, Barlean/New Exhibits. Barlean does not recall answering this question. Barlean depo. at 7. Barlean was not asked about and did not disclose his felony convictions during voir dire. In his deposition, Barlean stated that his convictions seemed irrelevant to his jury service and that his prison experience did not give him special experience or qualifications that would aid him as a juror. Barlean depo. at 11-12, 34.

36. In fact, Barlean was briefly confined in one of the same prisons in which Coleman was confined, although not at the same time.

A. State-created liberty interest

Under California law, ex-felons are incompetent to serve on juries. See Cal. Code Civ. P. § 203(a) (5) (formerly Cal. Code Civ. P. § 199); see also Cal. Const. Art. VII § 8(b) (state shall make laws excluding felons from jury service). The California Constitution provides that "[i]n criminal actions in which a felony is charged, the jury shall consist of 12 persons." Cal. Const. Art. I § 16.

Coleman argues that these state laws create a liberty interest in a jury of 12 non-felon jurors, the denial of which violates federal due process. He is correct that state law may create a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. See Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460-63 (1989). To create a federally protected liberty interest, however, a state law must 1) contain "substantive predicates" that govern official decision-making; 2) include explicitly mandatory language that specifies the outcome that must be reached if the substantive predicates are met (id. at 462-63; Dix v. County of Shasta, 963 F.2d 1296, 1299 (9th Cir. 1992)); and 3) implicate a liberty interest of "real substance." Sandin v. Conner, 115 S. Ct. 2293, 2297-2302 (1995). In other words, a claim for the denial of a state-created procedural right is not cognizable on federal habeas review unless the statute is sufficiently mandatory and the petitioner has been deprived of a federal substantive right. See, e.g., Bonin v. Calderon, 77 F.3d 1155, 1161-62 (9th Cir. 1996); Bonin v. Calderon, 59 F.3d 815, 841-42 (9th Cir. 1995); Moran, 57 F.3d at 698.

The California jury-qualification statute, even when read in conjunction with the state constitution provisions, does not meet this standard. California Code of Civil Procedure section 203(a) states, in relevant part, "All persons are eligible and qualified to be prospective trial jurors, except the following: . . . (5) Persons who have been convicted of . . . a felony, and whose civil rights have

not been restored." If this language could be construed as mandatory, at best the outcome it would dictate would be jury-eligibility for non-felons.

Moreover, the statute does not implicate a liberty interest of real substance. The Sixth Amendment does not bar ex-felons from jury service. See United States v. Boney, 977 F.2d 624, 633 (D.C. Cir. 1992). Nor does the Constitution guarantee a jury of Persons who have been convicted of 12 or a unanimous jury verdict. See Adodaca v. Oregon, 406 U.S. 404, 410-12 (1972) (rejecting Sixth Amendment challenge to 10-2 state jury verdict); Johnson v. Louisiana, 406 U.S. 356, 359-63 (1972) (rejecting due process challenge to 9-3 state jury verdict). But see 28 U.S.C. § 1864(b)(5) (convicted felons not eligible for jury service in federal court); United States v. Ullah, 976 F.2d 509, 512 & n.5 (9th Cir. 1992) (criminal defendants in federal court have a federal statutory and constitutional right to a unanimous jury verdict). It may very well be that the California statute serves to protect a criminal defendant's fundamental constitutional rights, such as the right to an unbiased jury. See People v. Green, 31 Cal.App.4th 1001, 1018 (1995) (legislature might have concluded that felon-juror would be biased against defendant); cf. United States v. Boney, 977 F.2d 624, 633 (D.C. Cir. 1992) (Congress may have considered possibility of bias in enacting statute excluding felons from jury service). But such a statute does not necessarily, or in this case, create a constitutionally protected liberty interest. See Bonin, 59 F.3d at 842.

Because Coleman does not have a state-created liberty interest in a jury of 12 non-felon jurors, he cannot state a cognizable constitutional claim.

B. Juror bias

The Sixth Amendment guarantees criminal defendants the right to a trial by an impartial jury. Where

a defendant alleges that juror was biased, the proper remedy is a hearing where he has the opportunity to prove actual bias. See Smith v. Phillips, 455 U.S. 209, 215 (1982). The court will presume bias only in extreme or extraordinary situations. See Tinsley, 895 F.2d at 527. It need not presume bias based on a juror's status as an ex-felon. See Boney, 977 F.2d at 633; see also Humphreys, 982 F.2d 254, 261 (8th Cir. 1992) (to obtain new trial, petitioner must demonstrate ex-felon was actually biased); United States v. Uribe, 890 F.2d 554, 562 (1st Cir. 1989) (felon-juror does not implicate fundamental fairness or constitutional rights; petitioner's claim depends on showing of bias).

To obtain a new trial because a prospective juror failed appropriately to answer a voir dire question, a party must first demonstrate that the juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause. McDonough Power Equip. Inc. v. Greenwood, 464 U.S. 548, 556 (1984). The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of the trial. Id. Forgetfulness does not indicate lack of impartiality. United States v. Edmond, 43 F.3d 472, 473-74 (9th Cir. 1994) (no misconduct where district court found juror's testimony that he forgot about being victim of armed robbery truthful).

Barlean did not respond dishonestly to any question on voir dire; he was never asked about his criminal record during jury selection. Assuming that Barlean's false response on the jury questionnaire was intentional, rather than inadvertent, the court cannot say that the dishonesty suggests bias. Barlean could not even have known at the time that his response would lead to jury service on a criminal case, as opposed to a civil case, let alone to service on Coleman's jury.

Barlean's convictions for forgery, writing checks with insufficient funds and fraudulent use of a credit card certainly may call into question his credibillty. Cf. Fed. R. Evid. 609(a)(2) (evidence of conviction of a crime involving dishonesty or false statement may be used to attack witness t credibility). But Coleman has not pointed to anything other than the fact of these convictions and Barlean's incarceration to suggest that Barlean was a biased juror.[37] The court declines to presume bias in this situation. The court further concludes that Coleman has not shown that Barlean was actually biased.

For these reasons, Coleman's claims about-juror Barlean are denied.

8. Juror misconduct

Coleman claims that he was denied an impartial jury and a fair trial because juror Verda New committed misconduct by not revealing that her cousin was a close friend of the victim's husband and had approached New during the trial. Respondent answers that Coleman cannot show prejudice from any contact New had with her cousin.[38]

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37. The court does not fault Barlean, however, for his inability at his deposition to remember the details of his nearly-20-year-old convictions and sentences.

38. He also argues that the California Supreme Court made an implicit finding, which this court must presume correct, that juror New was not biased. The court rejects this argument.

A state court's finding about juror bias, made after a hearing on the merits, is a factual determination entitled to a presumption of correctness. See Tinsley v. Borg, 895 F.2d 520, 525 (9th Cir. 1990). Here, however, the California Supreme Court denied the New claim, without a hearing, discussion or explanation, and with only two conflicting declarations from New before it. A federal court need not presume correct a state court finding of fact made under such circumstances. See 28 U.S.C. § 2254(d) (presumption not required if

Juror Verda New has a cousin, Ernest Jackson, who was friends with the victim's husband at the time of Coleman's trial Jackson depo. at 6; New depo. at 22, 28-29. New and Jackson were not close; they had not seen each other for several years before Coleman's trial. New depo. at 22-23, 25; Jackson depo. at 12. They have not spoken since Coleman's trial. New depo. at 26.

At some time during the trial, probably during jury selection, New encountered Jackson outside the courtroom. New depo. at 26-27, 61, 71; Jackson depo. at 8, 14. Seeing Jackson surprised and shocked New, because it made her realize that such a crime could happen "just right in your neighborhood, . . . somebody who, you know, so close, that it could happen." New depo. at 56.

Jackson told New, jokingly, that she "better give [Coleman] the death penalty." New depo. at 28, 30. New did not take the comment seriously. Id. at 58. Jackson told her that he was friends with the victim's husband, but he said nothing more about the victim, her husband or their relationship. Id at 28-29. Jackson apparently did not know the victim well. Jackson depo. at 6.

New promptly told Barlean about her encounter with Jackson.[39] New depo. at 30, 32. Barlean said there was no problem. Id. at 33. New did not tell the trial court or the attorneys. Id. She considered the meeting unimportant, and it did not affect her ability to serve as an impartial juror. Id.at 66, 75.

New also saw Jackson in the courtroom with the victim's husband. Id. at 34-35. She saw Jackson point her

state fact-finding was inadequate); Lawson v. Borg, 60 F.3d 608, 611 (9th Cir. 1995) (district court properly held an evidentiary hearing where state court refused to hold a hearing and resolved factual issue of juror misconduct based on contradictory declarations).

39. New and Barlean had worked together before the trial. Id. at 31.

out to the victim's husband. Id. at 35. Being singled out in this way made her uncomfortable. Id. at 35-36, 62.

As an initial matter, the court must determine the proper analysis to apply to this claim. The Ninth Circuit has identified two categories of juror misconduct: 1) juror receipt of extraneous material and 2) improper ex parse contacts. See United States v. Maree, 934 F.2d 196, 201 (9th Cir. 1991).

Because juror New did not learn any extraneous information about Coleman or the law to be applied at his trial, this claim is properly analyzed an a claim of ex parse contact. As such, it requires a showing of actual prejudice. Id.

There is no doubt that an improper ex parse contact between New and Jackson occurred in this case. But New and Jackson both stated that the encounter was brief, casual and conveyed no information about Coleman, the victim or the offense. Jackson's comment about the death penalty was intended to be a joke and was taken as such. New's conduct and her deposition testimony indicate that she took seriously the trial court's admonition not to discuss the case. New depo. at 74.

Based on these facts, the court concludes that Coleman has not shown that New's contact with her during the trial cousin resulted in actual prejudice. His claim regarding juror New is therefore denied.[40]

40. In a previous order, the court held that the New claim was not procedurally defaulted. It also allowed respondent to brief the question of which party bears the burden of showing that a state procedural rule is not applied consistently. In light of its decision on the merits of the New claim, the court need not address respondent's additional procedural default argument.

9. Prosecution's procurement of defense file

Coleman claims that his Fifth, Sixth, Eighth and Fourteenth Amendment rights were violated when the prosecution obtained and used information from Keane's trial file to pre-pare for trial. In support of the claim, he alleges that: 1) much of Keane's trial file disappeared before the trial; 2) the victim's husband worked as a janitor in the Hall of Justice building; and 3) the state was able to call rebuttal witnesses the morning after the defense presented its case even though Coleman had not previously given any indication that he would present an alibi defense.[41]

Respondent argues that Coleman's factual allegations in support of this claim are vague, unsupported and insufficient to establish a constitutional claim. He also contends that the claim has been procedurally defaulted.

In 1992, the California supreme Court denied this claim both on the merits and on the grounds that it was untimely. See In re Coleman, No. S025597, 1992 Cal. LEXIS 1660 (1992). Had the state court decided the claim solely on the merits, federal habeas review on the merits clearly would be appropriate. Here, however, the California Supreme Court's order also referred to a state law basis for a decision generally will preclude federal habeas review on the merits. Because the procedural rule at issue has not been consistently applied however, there is no procedural bar to this court's review of the claim.[42]

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41. The record belies Coleman's implication that the prosecution learned of his alibi defense prematurely from files taken from the public defender's office. Both rebuttal witnesses testified at trial that they had first been contacted by the prosecution shortly after the defense had presented its case. See RT 646, 653, 658, 660, 662, 669, 672.

42. This claim was decided by the California Supreme Court in 1992, while that court was still, concededly, inconsistently applying its

See Siripongs, 35 F.3d at 1318; In re Clark, 5 Cal.4th 750 (1993).

This court previously noted that Coleman's allegations, if substantiated, could establish a constitutional violation. To give Coleman an opportunity to develop factual support for his claim, the court in a 1992 order authorized certain discovery. Since then, Coleman has not offered any additional facts or legal authority to show that he is entitled to an evidentiary hearing or to habeas relief on the basis of this claim. Coleman has never alleged facts about prejudice he suffered from the claimed interference with his defense. See Wacht v. Cardwell, 604 F.2d 1245, 1247 (9th Cir. 1979).

These facts, combined with the fact that Coleman did not address this issue in his post-hearing briefing, lead the court to conclude that Coleman has abandoned this claim. See Acosta-Huerta v. Estelle, 7 F.3d 139, 142 (9th Cir. 1992) (finding habeas claims withdrawn). The court therefore denies this unsupported claim.

10. Offer of reward

Coleman claims that the prosecution suppressed information about a $25,000 reward offered for information leading to an arrest and conviction for the Hill homicide. If the reward was paid to a prosecution witness, Coleman contends, this information could have been used to show bias on the part of that witness. He argues that the suppression of this information, along with Keane's failure to investigate it, violated his rights to due process, effective assistance of counsel and reliable guilt- and penalty-phase proceedings.

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procedural rules. See Clark, 5 Cal.4th 750; see also Siripongs, 35 F.3d at 1318. This court's procedural-default analysis of this claim is thus different from the analysis it conducted in a previous order for the post-Clark juror misconduct claims.

Respondent answers that a reward flier was found in the police file for the case, but he does not know whether the reward had been posted or publicized. He admits that the prosecution never disclosed whether anyone sought or received the award. This court previously denied discovery and a hearing on this claim. It noted that Coleman had not identified any percipient witnesses whose testimony could have been biased by the award. Nor is the court otherwise aware of evidence of any such witnesses. As discussed above, Coleman's conviction rests on scientific fingerprint and semen evidence and on his initial statement that he had never been at the scene of the offense.

Because Coleman did not supplement the factual allegations previously found insufficient to support habeas relief or include this claim in his post-hearing briefs, the court concludes that Coleman has abandoned this claim. See Acosta-Huerta, 7 F.3d at 142. The claim is denied.

PENALTY PHASE CLAIMS

1. Penalty-phase ineffective assistance of counsel

Coleman argues that Keane inadequately investigated and presented available background and mental-state mitigating evidence. Specifically, he contends that Keane did not investigate or present evidence of Coleman's long history of psychiatric problems or substance abuse or of the physical, psychological and alcohol abuse present in his family.[43] Coleman claims that Keane's failures

43. Coleman contends, as a separate claim, that Keane was ineffective for failing to investigate his prior convictions and unadjudicated criminal activities introduced by the prosecution at the penalty phase. Coleman has not shown what Keane should have discovered about these incidents that could have blunted their impact as aggravating evidence. Nor did Coleman address this claim in his post-hearing briefing. The court concludes that Coleman has withdrawn this claim.

resulted in constitutionally deficient representation. Had Keane presented an accurate and complete penalty-phase portrait, Coleman argues, the jury would not have sentenced him to death.

Respondent answers that Keane's penalty-phase performance was constitutionally adequate, particularly in light of Coleman's failure to cooperate. Any deficiencies in Keane's representation, according to respondent, did not prejudice Coleman at the penalty phase.

A. Penalty-phase proceedings

Although Keane had previously represented several defendants charged with capital offenses, Coleman was his first case to go to a penalty phase. 3/23/94 EH at 58, 92; RT 1030. Co-counsel Patrice McElroy had no prior death penalty experience. McElroy depo, at 8-9. Keane's penalty-phase strategy was to show that Coleman stopped growing emotionally when he was eight years old when he saw his father kill another man and had to testify against him. Keane wanted to show that Coleman could not have developed adequate socialization skills because he had been incarcerated almost continually since that time. 3/23/94 EH at 134-35. Keane built his penalty-phase case around four pivotal events in Coleman's life: His witnessing of his father stabbing neighbor, his having to testify against his father, his early commitment to a juvenile institution and his placement in San Quentin's adjustment center. See 3/23/94 EH at 134-36, 147.

Coleman was not opposed to presenting a penalty-phase case, but he was unwilling to help Keane develop mitigating evidence. 3/23/94 EH at 110, 128. Coleman's mother was also uncooperative when Keane and McElroy tried to interview her. McElroy depo. at

20-21; 3/23/94 EH at 110-11; RT 966-76. Keane was nonetheless able to document much of Coleman's background through juvenile court, prison and psychiatric records he obtained. 3/23/94 EH at 112; see also Ex. 121 at 1-2, 4-6 (investigator's bills).

Keane gave the records to Dr. George Bach-y-Rita, a psychiatrist he retained early in the case to advise him about potential mental-state issues in both the guilt and penalty phases. 3/23/94 EH at 112-14, 117. Bach-y-Rita tried to interview Coleman, but Coleman at first refused to see him. Without an interview, Bach-y-Rita told Keane, he could not offer any psychiatric mitigating evidence. Id. at 118; 4/7/94 EH at 116. Keane thus ended his relationship with Bach-y-Rita. 3/23/94 EH at 118.

Eventually, however, Bach-y-Rita was able to conduct two long interviews with Coleman. 3/23/94 EH at 118; 4/7/94 EH at 108-10. Although he could not render a definitive diagnosis after these interviews, Bach-y-Rita did obtain information, including evidence of psychotic symptoms, that would have been helpful at the penalty phase. 4/7/94 EH at 116-17. Keane did not learn about this information because he did not contact Bach-y-Rita after his successful interviews with Coleman.[44] 3/23/94 EH at 119-21; 4/7/94 EH at 117. It appears that Keane did no further penalty-phase investigation or preparation until the conclusion of the guilt phase.[45] See 4/6/94 EH at 192-93, 196, 200; RT 958.

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44. As noted above, Keane also retained psychologist Linda Carson during the guilt phase. Her role was apparently limited to evaluating Coleman's competency to stand trial. Because Coleman refused to talk to her, however, Carson told Keane that she could not offer a definitive opinion. 3/23/94 EH at 145-46.

45. The jury returned its guilt-phase verdict on the afternoon of Tuesday, November 10, 1981; the penalty phase began the following Thursday.

In his penalty-phase opening statement, Keane told the jury that he would explain why Coleman had done "horrible things." RT 814. He described Coleman's early family life. He explained that Coleman had seen his father kill a neighbor and had been forced to testify against his father. He summarized Coleman's history of substance abuse and incarceration. He told the jury that Coleman had asked to be placed in the adjustment center to prevent him from killing the man who had murdered his sister, who was also an inmate at San Quentin. He painted a bleak picture of conditions in the adjustment center and described how Coleman was crazy when he left it.

Keane's first penalty-phase witness was Dr. Studenski, a psychiatrist in the Department of Corrections' outpatient clinic. RT 939. Keane had first contacted Studenski the day before his testimony. RT 958. But see 3/23/94 EH at 125-26 (Keane stated that he retained Studenski before the penalty phase and discussed his testimony before calling him as a witness). On the stand, Studenski described his 1979 interview with Coleman, who had come to him for psychiatric help. Coleman was troubled by financial pressures and by aggressive sexual urges. RT 942-43. He told Studenski about his siblings: one was murdered, one burned to death, one was in a mental hospital and others were in jail. RT 943. On cross-examination, Studenski stated his tentative diagnosis of Coleman: possible borderline syndrome, schizophrenia or chronic depression. RT 962-63.

Studenski also testified about conditions and possible effects of incarceration in the adjustment center at San Quentin. RT 941-51. Coleman had asked to be housed in the adjustment center because he feared that another inmate might kill him to prevent him from taking revenge for his sister's death on a friend of the man who murdered her. RT 944-45. Studenski told the jury that inmates in the adjustment center were isolated and under extreme tension. RT 945-47. As a result, they become very

paranoid, frightened and hostile to strangers. RT 949. Coleman complained about feeling paranoid when Studenski saw him in 1979. RT 950.

Keane also presented testimony from Coleman's mother, Margie Coleman, without telling Coleman in advance and over his objection. RT 814-15. Margie testified that her husband routinely beat her and that Coleman was aware of these beatings. RT 968. She told the jury that Coleman had been close to his father until he was eight years old, when he saw his father stab the neighbor to death and had to testify against him. RT 968-69. Margie described Coleman's sadness at the deaths of two of his siblings: a younger brother, who died in a fire when Coleman was 13; and an older sister, with whom Coleman had lived, who was murdered. RT 971, 973. She also testified about Coleman's near-continual history of juvenile and adult incarcerations. RT 972-75.

The third penalty-phase mitigation witness was Charles Jones, a minister who knew Coleman in 1979. Jones testified. about Coleman's good points, as well as about his violent temper and lack of control. RT 981-92.

Keane's closing argument focused on several mitigating factors. Based on Studenski's preliminary diagnosis, Keane argued that Coleman was suffering from a mental and emotional disturbance. RT 1036. Keane told the jury that Coleman's history of family trauma and institutionalization may have led him to believe that his conduct was justified. RT 1037-1041. Coleman may have been acting under the extreme duress" of his uncontrollable sexual urges, Keane argued, noting the testimony of both Studenski and Jones. RT 1041. Without explanation, Keane stated that the mitigating factor of mental disease or defect had been established. RT 1042. Keane also argued that Coleman's age at the time of the offense should also count in mitigation, since he was emotionally frozen at eight years of age. RT 1042-43.

The prosecution presented 12 penalty phase witnesses. Two young witnesses described the sexual assaults that led to Coleman's prior felony convictions. RT 918-37. Two witnesses testified about a 1977 incident in which Coleman forced a woman at knifepoint to come to his house, tied her up in a closet and threatened to kill her. RT 832-50. Four witnesses testified that Coleman stabbed another prisoner in 1980. Four other witnesses described other acts of prison violence and misbehavior: punching other inmates and harassing and throwing objects at jail staff. RT 896-900, 907-08, 914-16.

The prosecutor spent much of his penalty-phase argument attacking Keane's mitigation case. He argued that Keane had not shown what he promised in his opening statement to show. RT 999- 1004. He told the jury that Keane had not presented any evidence of diminished capacity or extreme mental or emotional disturbance. RT 1013-16. Coleman's own evidence, the prosecutor argued, proved that he was manipulative and dangerous, both in prison and on the outside. RT 1006, 1013, 1017-1030.

After the penalty phase, the trial court conducted an automatic review of the jury's verdict, as required by statute. Cal. Penal Code § 190.4(e). The trial court found that the prosecution had proved beyond a reasonable doubt all the acts of violence that it had introduced at the penalty phase. 11/20/81 RT at 8-9. It also found that Coleman had not established any mitigating circumstances. Id. at 9-11.

B. Analysis

The legal standard for ineffective assistance of counsel, discussed above, must be applied with equal rigor to this capital sentencing proceeding. See Burger v. Kemp, 483 U.S. 776, 788 (1987); Strickland, 466 U.S. at 686-87; M~k, 970 F.2d at 619. "The benchmark for judging any

claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686; Paradis v. Arave, 20 F.3d 950, 959 (9th Cir. 1994). This court must thus determine whether 1) Keane's performance at the penalty phase "fell below an objective standard of reasonableness under prevailing professional norms" and 2) there is a reasonable probability that, absent his errors, Coleman would not have been sentenced to death. Mak, 970 F.2d at 618-19. Because the court concludes that Coleman has not established prejudice, however, it need not discuss the performance prong. See Strickland, 466 U.S.at 697.

As an initial matter, the court notes that Coleman does not argue that Keane lacked a mitigation strategy. Nor does he challenge Keane's choice of strategy for the penalty phase. See Williams v. Calderon, 52 F.3d 1465, 1470 (9th Cir. 1995). In any case, the record supports Keane's evidentiary hearing testimony that he had a mitigation strategy, and the court concludes that it was a reasonable strategy under the circumstances. Cf. Hendricks v. Calderon, 70 F.3d 1032, 1037-38 (9th Cir. 1995). Coleman does argue that Keane inadequately executed his chosen strategy because he failed to present evidence previewed in his opening statement and to develop other available mitigating evidence that would have supported his penalty-phase theory. He has identified five areas of potential mitigating evidence that Keane ignored altogether or inadequately investigated, presented and argued to the jury. Thus, according to Coleman, his jury was prevented from properly considering in mitigation facts showing that: 1) Coleman's family was rife with dysfunction and neglect; 2) Coleman's institutionalization at a young age was both unusual and severely damaging; 3) Coleman asked to be housed in the adjustment center for the safety of himself and others; 4) Coleman had a

long and well-documented history of psychiatric and emotional problems and substance abuse and addiction; and 5) several family members suffered from mental illness and substance abuse.

After reviewing the trial record and the material presented at and in conjunction with the evidentiary hearing, the court concludes that any deficiencies in Keane's penalty-phase performance did not prejudice Coleman. Keane put before the jury much of the information that Coleman now alleges was not presented.[46] In his closing, he connected the mitigating evidence to the statutory factors. See, e.g., RT 1034 (violent criminal activity), 1037-39 (moral justification or extenuation), 1042 (age). Where trial counsel has done as much, courts have not found prejudice. See Williams, 52 F.3d at 1471.

Coleman has established that Keane could have introduced some additional evidence in each of the categories identified above. He could have presented testimony, for example, that Coleman's mother locked him in his room and beat him with a belt, that Coleman was a certified heroin addict and that his sister had been diagnosed as paranoid and schizophrenic. See, e.g., Exs. 8, 20, 21, 33. In light of the evidence actually presented about Coleman's family and his background, however, the

46. The jury learned that two of Coleman's siblings seven siblings had been killed, that Margie had very little time to care for her children, that Coleman's father routinely beat Margie and that Coleman had seen his father stab a neighbor to death and had been forced to testify against him. See RT 943, 968-69, 971-73, 984, 992. The jury also heard from Margie Coleman that Coleman spent most of his life in juvenile, and later adult correctional, institutions from the time he was ten years old. RT 970-75. Studenski testified that Coleman had a sibling in a mental hospital, that Coleman himself had sought help for his mental health problems and that he had tentatively diagnosed Coleman with borderline syndrome, schizophrenia and depression. RT 941-62.

court cannot conclude that this and other unoffered testimony would have made a difference. See Williams, 52 F.3d at 1471.

The court also notes that some of this new evidence could have opened the door to damaging rebuttal evidence. Cf. Burger, 483 U.S. at 793 (counsel not ineffective where unpresented evidence could have led to introduction of harmful evidence); Mak, 970 F.2d at 618 and n.6 (same) But see Harris v. Dugger, 874 F.2d 756, 764 (11th Cir. 1989) (prejudice from failure to present mitigating evidence even though it would have allowed introduction of aggravating evidence). Court documents establishing that Coleman had been certified a heroin addict, for example, also reflect that he had been convicted of 14 prior felonies, not all of which were disclosed to the jury. See Ex. 9 at 8, 10. Similarly, the prison record of Coleman's request to be placed in the adjustment center to prevent him from taking revenge against his sister's killer could also be used to show his calculated malice toward inmates and prison staff. See Ex. 11; see also RT 1006, 1012 (prosecution argument that Coleman is manipulative and dangerous). This account also could have been contradicted by testimony from a psychiatrist that Coleman said that he preferred the adjustment center because of the solitude. Ex. 17.

The additional mental-health evidence presents the same problem. Psychiatric evaluations finding psychosis, paranoia and ideas of reference could have been countered with evaluations finding no clear psychosis, hallucinations, delusions or gross mental defects. Compare Exs. 11, 12, 13, 16 with Exs. 9, 12, 14, 17; see Harris, 913 F.2d at 628 (counsel not ineffective for not presenting psychiatric testimony that would have been subject to cross-examination based on equally persuasive, inconsistent psychiatric opinions). Even more damaging, psychiatric evidence could have been introduced to show that Coleman was both violent and undeterred by

incarceration. See Exs. 13, 14, 17; see Bannister v. Armontrout, 4 F.3d 1434, 1443 n.13 (8th Cir. 1993) (evidence of antisocial personality disorder may be used in aggravation to show defendant is dangerous and not amenable to rehabilitation). By contrast, Keane tried during closing argument to minimize the violence of Coleman's prior offenses. RT 1034; see also Burger, 483 U.S. at 793 (counsel not ineffective for not presenting evidence that would have been inconsistent with defense strategy).

Coleman also claims ineffective assistance based on Keane's failure to argue lingering doubt at the penalty phase.[47] It is unclear from the record whether Keane made a strategic decision not to make the argument. When the court does not know whether counsel's decision is tactical, but a tactical decision under the circumstances would be reasonable, the court may presume that counsel acted competently. See Harris v. Pulley, 885 F.2d 1354, 1368 (9th Cir. 1988). Here, Keane reasonably could have concluded that the better course was implicitly to accept responsibility for the offense and offer explanations for

47. In evaluating this claim, according to Coleman, the court must take into account not only the evidence that was presented at the guilt phase but also the evidence that should have been presented. On these facts, the court disagrees. The court has found that Keane's representation at the guilt phase was constitutionally adequate. His strategy at the guilt phase was to establish an alibi for Coleman; i.e., to show that there was a reasonable doubt that Coleman was the perpetrator of the offence. Because Keane did all that he was constitutionally required to do to establish a reasonable doubt, it follows that he need not have done more to support an argument for lingering doubt, which is necessarily a lower standard.

Keane thus did not act unreasonably at the penalty phase in failing to present additional evidence in support of Coleman's innocence. Cf. Siripongs, 35 F.3d at 1315. Therefore, the court will determine whether Keane was ineffective for failing to argue lingering doubt based on the evidence that was actually presented.

Coleman's conduct. See Hamilton, 17 F.3d at 1164; Felker v. Thomas, 52 F.3d 907, 912 (11th Cir. 1995).

For these reasons, Coleman's claim of ineffective assistance of counsel at the penalty phase is denied.

2. Factor (k) instruction

Coleman claims that the jury instructions and the prosecutor's argument prevented the jury from properly considering the mitigating evidence he presented. Because it was instructed to consider only evidence related to the statutory factors, Coleman argues, the jury could not weigh in his favor the testimony about his background and character. Respondent answers that the United States Supreme Court has upheld the instruction Coleman challenges, and, in this case, the instruction did not prejudicially mislead the jury.

Coleman's jury was instructed at the penalty phase to "consider all of the evidence which has been received during any part of this trial." RT 1058, 1061-62. The trial court then read the 11 statutory capital sentencing factors that delineated the subjects for the jury's consideration.[48] RT 1058-60; See also Cal. Penal Code

48. The jury was instructed, in the language of the statute to consider, take into account and be guided by the following factors, if applicable:

> The circumstances of the crime of which the defendant was convicted in the [sic] present proceeding and the existence of any special circumstances found to be true;
>
> The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence;
>
> The presence or absence of any prior felony conviction;

§ 190.3. The last factor, factor (k), directed the jury to consider "any other circumstance which extenuate [sic] the gravity of the crime, even though it is not a legal excuse for the crime.[49] RT 1059; see also Cal. Penal Code § 190.3(k). The jury was instructed to "consider only those aggravating and mitigating factors which I have . . . read

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Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;

Whether of not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act;

Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct;

Whether or not the defendant acted under extreme duress or under the substantial domination of another person;

Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effect of intoxication;

The age of the defendant at the time of the crime;

Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor;

Any other circumstance which extenuate [sic] the gravity of the crime, even though it is not a legal excuse for the crime.

RT 1058-59.

49. Two years after Coleman's trial, the California Supreme Court directed trial courts in the future to inform capital sentencing juries that factor (k) encompasses "any other aspect of the defendant's character or record that the defendant proffers as a basis for a sentence less than death." People v. Easley, 34 Cal.3d 858, 878 n.10 (1983) (internal quotation marks omitted); see also Boyde, 494 U.S. at 374 n.2.

to you in determining which punishment shall be imposed on this defendant."[50] RT 1060.

"[A] sentencer may not be precluded from considering, and may not refuse to consider, any relevant mitigating evidence offered by the defendant as the basis for a sentence less than death." Penry v. Lynaugh, 492 U.S. 302, 318 (1989); see also Boyde v. California, 494 U.S. 370, 377-78 (1990). Here, as in Boyde, petitioner argues that an ambiguous instruction prevented the jury from giving effect to his relevant mitigating evidence. The proper inquiry in this situation is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Id. at 380. The court must consider the effect of the instruction in light of the entire charge to the jury. Id. at 378.

In Boyde, the Supreme Court upheld the factor (k) instruction, concluding that it did not prevent the defendant from arguing that his background or character evidence "extenuated or excused the seriousness of the crime." Boyde, 494 U.S. at 382 (internal quotation marks omitted). According to the Court, the instruction allowed reasonable jurors to use this type of evidence to lessen a defendant's culpability for the offense and provide a basis for a sentence other than death. "The jury was directed to consider any other circumstance that might excuse the crime, which certainly includes a defendant's background and character." Id. (emphasis in original).

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50. The penalty-phase instructions were brief. The trial court did not define mitigating or extenuating circumstances. Cf. Odle v. Vasquez, 754 F. Supp. 749, 753-54 (N.D. Cal. 1990). Nor did it instruct the jury that pity, sympathy or sentiment for Coleman, which it was instructed not to consider at the guilt phase (RT 772), were appropriate penalty-phase considerations. Cf. id.; Bonin v. Vasquez, 794 F. Supp. 957, 986.

The Court noted in Boyde that the context in which the instruction was given supported its conclusion. The facts that the evidence was admitted and the jury was instructed to consider all of the evidence encouraged a proper interpretation of the factor (k) instruction. Id. at 383-84. In addition, other statutory factors indicated to the jury that it could consider mitigating evidence unrelated to the capital offense. Id. at 383. But see id. at 402 n.7 (Marshall, J., dissenting). Finally, the Court pointed out that the prosecutor did not argue that the jury could not take into account the penalty-phase evidence presented by the defendant. Id. at 385. For these reasons, the Court concluded that "there is not a reasonable likelihood that the jurors . . . understood the challenged instructions to preclude consideration of relevant mitigating evidence offered by petitioner." Id. at 386.

Coleman challenges the same instruction that the Court addressed in Boyde.[51] The challenge is somewhat stronger, however in the context of Coleman's trial. Unlike the prosecutor in Boyde, Coleman's prosecutor told the jury that it could not consider mitigation evidence that was

51. In Boyde, but not in Coleman, however, "extenuate" was defined for the jury as "to lessen the seriousness of a crime as by giving an excuse." Id. at 381, 382 n. 5.

not directly related to the crime.[52] Cf. Boyde 494 U.S. at 385-86. After reading factor (k), he said,

> [P]erhaps the defense team thought that that includes bring a mother into court and saying, "Pleas don't kill my son," except if you listen to that instruction carefully, it is this: Any other circumstance which extenuates the gravity of the crime. So, we are talking about the crime.

RT 1016 (emphasis added). He told the jury that Coleman's humanity "is not one of the factors in mitigation." RT 1011. Contra Mak, 97- F.2d at 619 (finding ineffective assistance of counsel where "defense counsel never . . . portrayed Mak as a human being who was a devoted son with family members who loved him"). The prosecutor also argued that the jury should not "be swayed by cries of mercy, because this is not a mercy hearing. If it were, the law would so say." RT 1030 Contra Penry v. Lynaugh, 4902 U.S. 302, 327 (1989) (death penalty statute constitutionally may allow jury to recommend mercy based on mitigating evidence presented).

52. The Court in Boyde noted that counsel's arguments may form part of the context in which instructions may be reviewed, but t hey "generally carry less weight with a jury than do instructions form the court." Boyde, 494 U.S. at 384-86 and n. 6; see also Penry v. Lynaugh, 492 U.S. 302, 325-26 (1989) (analyzing effect of parties' arguments on jury's consideration of mitigating evidence. Here, however, he trial court did not instruct the jury at the penalty phase that it should not consider the statements of counsel as evidence. Cf. Boyde, 494 U.S. at 384. But see RT 772 (guilt-phase instruction);999 (prosecutor's penalty-phase argument). The trial court specifically instructed the jury to evaluate the aggravating and mitigating circumstances "[a]fter having heard all the evidence and after having heard and considered the arguments of counsel. . . . (RT 1060 (emphasis added).

On direct review, the California Supreme Court concluded that the prosecutor's argument was "troublesome" but that he did not "expressly" tell the jury that the mitigation evidence presented was irrelevant to its sentencing decision. Any ambiguity in his argument, according to the state court, was cured by the jury instructions and by Keane's argument. See Coleman, 46 Cal.3d at 785. Keane's argument, however, did not explain to the jury how to apply factor (k) properly.

In his argument, Keane read the first ten statutory facts and discussed how the mitigating evidence supported each applicable factor. See RT 1036-43. With respect to factor (k), however, Keane offered no ling to the evidence he had presented. He said only, "And the, K, which is the last one and which leaves you a great catchall, for within your conscience, the words weigh any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime [sic]." (RT 1043.

Keane did not explain that factor (k) allowed the jury to give mitigating effect to Coleman's background and character evidence in its own right. He did offer the jury a means, through the other statutory factors, to consider this evidence in mitigation. He argued, for example, that Coleman's background -- seeing his father murder a man and spending 20 years in juvenile institutions -- may have led him to believe that his conduct was morally justified. RT 1037-40. But see RT 1040 (arguing that coleman's beliefs do not justify the murder); 11/20/81 RT at 10 (ruling on motion to modify the verdict, the trial court found "no circumstances which the Defendant could reasonably believe to be a moral justification or extenuation for his conduct"). If the jury declined to put the mitigating evidence of Coleman's background and character into the first ten statutory factors, however, Keane's argument offered it no help in fitting this evidence into the supposedly expansive factor (k). The arguments of the parties thus did not encourage

Coleman's jury to give proper effect to the mitigating evidence he presented.[53] See Penry, 492 U.S. at 328.

The court is concerned that the arguments in this case added uncertainty to the already-ambiguous factor (k) instruction. But the court is not convinced that this case is significantly distinguishable from Boyde, which held that the instruction was not constitutionally infirm. Aside from the parties' arguments, the two cases are factually similar. In both, substantial mitigating evidence was admitted, the juries were instructed to consider all the evidence and the juries were instructed on other factors unrelated to the offense. For the reasons set forth in Boyde, the court thus concludes that the jury was not reasonably likely to interpret the instruction in a way that prevented it from giving effect to coleman's mitigating evidence. This claims is therefore denied.

3. Mandatory death-sentence instruction

Coleman claims that his penalty-phase verdict is unconstitutional because the jury was instructed, in mandatory terms,t o sentence him to death if it found that the aggravating circumstances outweighed the mitigation. He contends that the instruction improperly created a conclusive presumption that death was the appropriate

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53. The trial court's ruling on the motion to modify the verdict give further credence to this court's concerns about misapplication of the penalty-phase instructions. In its discussion of factor (k), the trial curt stated, "none of the witnesses called could offer any explanation nor give any evidence of any conceivable circumstance which the Court finds would extenuate the gravity of the crime." 11/20/81 RT at 9. The trial court referred to the evidence Coleman presented only in the context of the first ten statutory factors, rejecting a finding of mitigation as to each one. Id. at 9-11. Its discussion suggests that even the trial court believed that it could not use factor (k) to take into account Coleman's background and character.

sentence once the jury concluded that the aggravation outweighed the mitigation. This presumption, according to coleman, prevented the jury from applying California law at the penalty phase and thus violated due process.

Respondent answer that the instruction at issue was upheld by the United States Supreme Court in Boyde. He also responds that this court is bound by the determination of the California Supreme Court that the instruction does not create a mandatory presumption in favor of death.

Coleman's jury was instructed, in the language of the California death-penalty statute,

> If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the State prison for life without the possibility of parole.

RT 1061-61 (emphasis added); see also Cal. Penal Code § 190.3. The Court in Boyde rejected an argument that the "mandatory language" of this instruction prevents juries form conducting the individualized sentencing required in capital cases. Boyde v. California, 494 U.S. 370, 377 (1990); see also Bonin, 59 F.3d at 849.

Coleman's challenge rests on subtly different grounds. He does not claim that the instruction itself violated due process by requiring the jury to impose a death sentence if it found that the aggravating circumstances outweighed the mitigation. Cf. Blystone v. Pennsylvania, 494 U.S. 299 (1990) (statute requiring death sentence where jury finds aggravating circumstances outweigh mitigating circumstances is not unconstitutionally mandatory); Boyde, 494 U.S. at 377 (upholding this instruction under

Blystone). He argues instead that the conclusive presumption created by the instruction violated due process by preventing the jury from determining, as required by California Law, whether death was the appropriate sentence for Coleman.

The court is not convinced that this instruction is properly analyzed as a conclusive presumption.[54] A conclusive presumption instruction requires the jury to find the presumed fact once the predicate fact has been prove. See e.g., Carella v. California, 491 U.S. 263, 264 (1989); Ulster county court v. Allen, 442 U.S. 140, 157 (1979). the predicate in the instruction at issue is not the proof by the prosecution of a basic fact but a weighing by the jury of aggravating and mitigating circumstances. similarly, the instruction at issue directs the jury not to find the presumed fact but to impose a sentence. Cf. Carella, 491 U.S. at 265; Sandstrom v. Montana 442 U.S. 510, 517 (1979); Ulster County Court, 442 U.S. at 157.

Assuming, however, that the instruction is a conclusive presumption, this court must determine "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution.[55] Estelle v. McGuire, 502 U.S. 62, 72 and n. 4 (1991) (citing Boyde, 494 U.S. at 380). Coleman

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54. The California Supreme Court has concluded that similar instructions do not create a mandatory presumption in favor of a death sentence. See People v. Duncan, 53 Cal.3d 955, 978-79 (1991); People v. Andrews, 49 Cal.3d 200, 230 (1989). Contrary to respondent's contention, however, the state court "is not the final authority on the interpretation which a jury could have given the instruction." Sandstrom v. Montana, 442 U.S. 510, 517 (1979.)

55. The Court in Sandstrom and Carella analyzed conclusive presumptions in terms of reasonable jurors could have interpreted the instruction. In Estelle v. McGuire, 502 U.S. 62 (1991), however, the Court announced "a single standard of review for jury instructions -- the 'reasonable likelihood' standard." Id. at 72 n.4 (1991). This court will analyze the instruction accordingly.

argues that the instruction violated the Constitution by preventing the jury from properly applying state law that requires it to find that death is the appropriate sentence before imposing the sentence. In this case, however, the court concludes that it was not reasonably likely that the jury was misled abut its responsibility under state law.

At the time of his trial in 1981, the California Supreme Court had not yet reviewed or interpreted the death-penalty statute under which Coleman was convicted and sentenced. In 1985, it held that the statute must be interpreted to allow the jury to reject a death sentence if it decided that death was not the appropriate penalty under the facts and circumstances of the case. See People v. Brown, 40 Cal.3d 512, 540 (1985), rev'd on other grounds, 479 U.S. 538 (1987). According to the state court's interpretation, the jury determines the propriety of the penalty by weighing the statutory factors. State law does not require the jury to make a separate evaluation, after weighing the aggravation and mitigation, about whether death is the proper penalty under the circumstances. See Brown, 40 Cal.3d at 541, 544; People v. Duncan, 53 Cal.3d 955, 977-79 (1991).

The California Supreme Court is the ultimate expositor of California law; this court is bond by its construction of the statute. See, e.g., Wisconsin v. Mitchell, 113 S. Ct. 2194, 2198-99 (1993); Peltier v. Wright, 15 F.3d 860,861-62 (9th cir. 1994). This court also agrees with the California Supreme Court that the instruction "leaves room for confusion" about the scope of the jury's capital-sentencing discretion. See, e.g., Brown, 40 Cal. 3d at 544 n. 17; People v. Myers, 43 Cal.3d 250, 273 (1987); see also Boyde, 494 U.S. at 374-75 n.3. Any confusion was dispelled in this case, however, by the parties' argument at the penalty phase.

The jury was instructed to consider the penalty-phase arguments of both parties,as well as the aggravating and mitigating factors. RT 1060. Keane and the

prosecutor both made it clear that jury had the opportunity and duty to decide which punishment was appropriate for coleman. After reviewing the penalty-phase evidence presented, the prosecutor argued that a death sentence was "morally justified" in Coleman's case. RT 1029; see also RT 1027 ("I am convinced that this is one of those case, perhaps one of those few cases where the proper penalty is death), 1030 (same). Keane told the jury that the weighing requirement "leaves to your individual consciences, your own responsibility, your own interpretation of things, based upon your common sense interpretation of lives." RT 1033. Keane emphasized that each juror had the discretion and responsibility to decide whether coleman should be sentenced to death. RT 1043-47, 1052, 1055; see also RT 1057 ("[d]on't kill. You don't have to, the law say you don't have to. Your own conscience says you don't have to. don' go against your own conscience"). Neither attorney told the jury that it must sentence Coleman to death it found that the aggravating circumstances outweighed the mitigating circumstances. The court therefore concludes that, in the context of Coleman's penalty phase, it is not reasonably likely that jury was prevented form considering whether death was the appropriate punishment, as the statute required.

Coleman also argues, in a footnote, that the instruction violated due process by arbitrarily denying him a state-created liberty interest in having a jury determine that death was the appropriate punishment in his case. The denial of a state-created procedural right may, in certain circumstances, violate due process. See Bonin, 59 F.3d at 841; Moran, 57 F.3d at 697. Only the denial or misapplication of state procedures that results in the deprivation of a substantive right will implicate a federally recognized liberty interest." Moran, 57 F.3d at 698 (emphasis added).

As discussed above, however, the instruction at issue did not clearly violate or cause the jury to misapply California capital sentencing law. See Coleman, 46 Cal.3d at 783-87; cf. Bonin, 59 F.3d at 841 (accepting state supreme court's determination that trial court violated state statute by denying co-counsel the opportunity to argue case); Williams, 52 F.3d at 1480-81 (finding no due process violation where state supreme court found that the challenged instruction did not violate state law); Moran, 57 F.3d at 698 (noting violation of state law where state court found that the challenged instruction did not violate state law); Moran, 57 F.3d at 698 (noting violation of state law where state court at competency hearing placed burden of proof on defendant; Fetterly v. Paskett, 997 F. 2d 1295, 1299 (9th Cir. 1993) (noting that trial court may have misapplied state statute when weighing aggravating and mitigating factors). The jury followed state procedure, as defined by the statute and the California Supreme Court, when it determined whether death was the appropriate penalty for coleman by weighing the aggravating and mitigating factors. Where there is no state-law error, there can be no due process violated for failure to follow state procedures. See Williams, 52 F.3d at 1481.

For these reasons, the curt rejects Coleman's due process challenge to the instruction.

4. Evidence of unadjudicated criminal activity

Coleman claims that his constitutional rights were violated in several ways by the prosecution's introduction at the penalty phase of evidence of prior criminal activity. Respondent argues generally that the claims would require the court to create new rules of criminal procedure, which may not be applied retroactively on habeas review. He also responds more specifically to each issue raised by Coleman, as discussed below.

The prosecution presented aggravating evidence through twelve penalty-phase witnesses. Eight of the witnesses testified about various acts of violence and misbehavior while Coleman was in prison, including stabbing an inmate, punching other inmates, and resisting, harassing, threatening and throwing objects at jail staff. RT 896-900, 907-08, 914-16. Coleman had never been prosecuted for or convicted of any of these latter incidents. The evidence of these incidents was relevant to the sentencing factor enumerated in California Penal Code § 190.3(b): "The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence."

Coleman challenges the admission of the evidence of these incidents on three separate constitutional grounds.[56] Each challenge will be discussed in turn below.

A. Instructional due process violations

Coleman claims that his death sentence is unconstitutionally unreliable, in violation of the Eighth Amendment, because the jury was never instructed that it must find the unadjudicated criminal activity true unanimously and beyond a reasonable doubt. He also contends that the jury should have been instructed about the elements of the unadjudicated criminal activity.

In addition to his retroactivity argument, respondent answers that the Constitution does not require that criminal activity used in aggravation be proved beyond a reasonable doubt. He also contends that existing law does not require unanimity on aggravating factors.

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56. Coleman raised a double jeopardy challenge to this evidence as a separate claim; this order addresses that issue separately below.

1. Beyond a reasonable doubt

California law requires that the jury be instructed that it may consider unadjudicated criminal acts as an aggravating factor only if they are proved beyond a reasonable doubt. Coleman's jury was not instructed about this state-law requirement. See Coleman, 46 Cal.3d at 782. The omission violated only state law, however, and therefore is not cognizable on federal habeas review. See Williams, 52 F.3d at 1481; see also Tuilaepa v. California, 114 S. Ct. 2630, 2639 (1994) (jury may be given wide discretion to evaluate and weigh relevant capital sentencing factors).

2. Unanimity

The trial court instructed Coleman's jury that it must reach unanimous decision about which of the two possible sentences to impose. RT 1061. The jury was not instructed that it may not consider unadjudicated criminal activity in aggravation unless it unanimously found that Coleman had committed such conduct. California law does not require a unanimous finding for this -- or any -- statutory factor. See People v. Ghent, 43 Cal.3d 739, 733-34 (1987).

When raised by respondent, a federal court must, as a threshold issue, decide whether the principle au non-retroactivity set forth in Teague v. Lane, 489 U.S. 288 (1989), bars habeas review of a petitioner's claim. See Caspari v. Bohlen, 114 S. Ct. 948, 953 (1994). The Teague analysis consists of three steps. First, the court must determine the date on which petitioner'" conviction became final. Second, "the court must survey the legal landscape as it then existed and determine whether a state court considering the defendants claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution." Id. (internal quotations

omitted). Third, if petitioner seeks application of a new rule, the court must determine whether the rule falls within one of the two exceptions to Teague. Id. Applying this analysis, this court agrees with respondent that Coleman's claim would require it to apply a new rule of criminal procedure.

Coleman's conviction became final on March 27, 1989, when the United States Supreme Court denied his petition for certiorari after his direct appeal. See Coleman v. California, 489 U.S. 1100 (1989). To this date, neither the United States Supreme Court nor the Ninth Circuit has decided whether a capital sentencing jury must find unanimously the aggravating factors that it uses to support a death sentence. See Bonin v. Vasquez, 807 F. Supp. 589, 623 (C.D. Cal. 1992), aff'd on other grounds 59 F.3d 815 (9th Cir. 1995) (rejecting argument and noting the dearth of applicable case law). On the other hand, other decisions strongly suggest that such a constitutional requirement was not "dictated by precedent existing at the time the defendant's conviction became final." Teague, 489 U.S. at 301. The Constitution does not require that a jury "impose the sentence of death or make the findings prerequisite to imposition of such a sentence." Clemons v. Mississippi, 494 U.S. 738, 745 (1990); see also McMillan v. Pennsylvania, 477 U.S. 79, 93 (1986). When a jury is the sentencer in a capital case, it need not specify the aggravating factors on which it relies. See Hildwin v. Florida, 490 U.S. 638 (1989). In state-court criminal trials, where the Constitution provides a right to trial by jury, defendants have no federal constitutional right to a unanimous jury verdict. See Johnson v. Louisiana, 406 U.S. 356, 359-63 (1972) (rejecting due process challenge to 9-3 verdict); see also Apodaca v. Oregon, 406 U.S. 404, 410-12 (1972) (rejecting Sixth Amendment right-to-jury-trial challenge to 10-2 verdict). Based on these cases, the court concludes that a unanimity requirement for aggravating factors would be a new rule.

These decisions also lead this court to conclude that neither exception to the non-retroactivity doctrine applies to this claim. A rule requiring capital sentencing juries to find unanimously the unadjudicated-criminal-activity aggravating factor would not "forbid[] criminal punishment of certain primary conduct or . . . prohibit[] a certain class of punishment for a class of defendants because of their status or offence." Beam v. Paskett, 3 F.3d 1301, 1310 (9th Cir. 1993) (internal quotes omitted). The rule would instead impose an additional procedural requirement on the capital sentencing proceeding. See Penry, 492 U.S. at 329-30 (exception applies to constitutionally protected primary conduct and substantive, not procedural, constitutional guarantees).

Nor is it a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding."

Saffle v. Parks, 494 U.S. 484, 495 (1990) (internal quotes omitted). A unanimity requirement may enhance the reliability of a jury's fact-finding. See Brown v. Louisiana, 447 U.S. 323. 331 (1980). As the cases above demonstrate, however, such a requirement is not "essential to the accuracy and fairness" of the sentencing determination in a capital case. See Sawyer v. Smith, 497 U.S. 227, 243 (199O).

Because the unanimity requirement Coleman seeks to have applied in his case was not dictated by precedent existing when his conviction became final, this court may not apply this requirement to his case.

3. Elements of unadjudicated criminal offenses

Coleman's jury was not instructed about the elements of the prior criminal activity that the prosecution presented in aggravation at the penalty phase. State law does not require the trial court to instruct sue sponte on the elements of the specific crimes that this evidence tends

to prove. See People v. Price, 1 Cal.4th 324, 489 (1991). Neither the United States Supreme Court nor the Ninth Circuit has addressed this precise claim. Cf. Tuilaepa, 114 S. Ct. at 2637 (rejecting vagueness challenge to this instruction); Delo v. Lashley, 113 S. Ct. 1222, 1225 (1993) (finding no due process violation where defendant is required to present evidence to support instruction on absence of prior criminal activity). Coleman has not cited to this court any relevant precedent to support his claim that such an instruction was constitutionally required, and this court has found none. Generally, however, the jury has broad discretion to consider relevant information about the character of the defendant at the penalty phase of a capital trial. See, e.g., Tuilaepa, 114 S. Ct. at 2635, 2638; Dawson v. Delaware, 503 U.S. 159, 164 (1992). Relevant aggravating information about the defendant's propensity for violence need not fit into the statutory definition of a criminal offence. See, e.g., Simmons v. South Carolina, 114 S. Ct. 2187, 2193 (1994) (plurality opinion) (jury may consider defendant's future dangerousness); id. at 2198 (Souter, J., concurring); id. at 2199 (Ginsburg, J., concurring); [*id*. at 2200 (O'Connor, J., concurring); Jurek v. Texas, 428 U.S. 262, 274-76 (1976) (plurality opinion). The Court's analysis of this instruction on vagueness grounds suggests that the critical issue for the jury is "whether certain events occurred," rather than whether they establish that Coleman committed a crime under California law. See Tuilaepa, 114 S. Ct. at 2637. The instruction at issue did not prevent Coleman from presenting evidence that the conduct did not occur or was not violent. Cf. Simmons, 114 S. Ct. at 2198; Gardner v. Florida, 430 U.S. 349, 362 (1977) (plurality opinion).

A review of the relevant cases has convinced this court that there was no precedent existing at the time Coleman's conviction became final that would have required an instruction on the elements of the prior

criminal conduct at the penalty phase.[57] Harmon v. Marshall, 69 F.3d 963, 967 (9th Cir. 1995) (declining to decide whether rule requiring instruction on every element of offense at trial is new rule). The cases discussed above also suggest that such a rule is not critical to the accuracy or fundamental fairness of the penalty-phase proceedings. Cf. id. Under the principles of Teague and its progeny, the rule Coleman seeks thus may not be retroactively created or applied in his case.

B. Biased jury

Coleman claims that he was denied his constitutional right to an impartial jury because the same jury that convicted him at the guilt phase had to decide at the penalty phase whether he committed other, unrelated criminal offenses.[58] Once the state grants a criminal defendant the right to a jury, Coleman argues, due process requires that that jury be impartial. The jury that heard the evidence and convicted him of the capital offense could not impartially hear the evidence of his other-criminal activity.

As discussed above, a state need not provide for capital sentencing by a jury. See e.g., Walton v. Arizona, 497 U.S. 639, 647 (1990); Carriger v. Lewis, 971 F.2d 329, 334 (9th Cir. 1992) (en banc). California law, however, does require that a jury be the trier of fact at the penalty phase absent a waiver by both parties. Cal. Penal Code § 190.4(b), (c). Furthermore, the statute expresses a "strong

57. Although mont of the cases cited were decided after 1989, there is no constitutional impediment to applying changes in the law detrimental to petitioner that occurred after his conviction became final. See Lockhart v. Fretwell, 113 S. Ct. 838, 844 (1993).

58. Respondent's argument that Coleman did not raise this claim in his petition is mistaken. See Fourth Amended Petition for Writ of Habeas Corpus, filed 6/20/94, at 38.

legislative preference for a unitary jury" -- one jury for both the guilt/special circumstance phase and the penalty phase of a capital trial. See People v. Balderas, 41 Cal.3d 144, 204 (1985).

The Supreme Court has recognized a state's legitimate interest in a unitary jury and upheld state statutes that provide for one jury at both phases of a capital trial. See Lockhart v. McCree, 476 U.S. 162, 175-76, 180 (1986); see also Bonin, 59 F.3d at 839-40. The constitutional right to an impartial jury guarantees a jury that can reach a verdict based on the law and evidence as presented at trial. Cf. Ham v. South Carolina, 409 U.S. 524, 527 (1973) (denial of voir dire regarding racial prejudice violates due process); Groppi v. Wisconsin, 400 U.S. 505, 508-510 (1971) (categorical denial of change of venue violates right to impartial jury); Irvin v. Dowd, 366 U.S. 717, 722 (1961) (prejudicial publicity violates Fourteenth Amendment). These cases suggest that a jury that has heard the guilt-phase evidence against the defendant is not categorically unable to render an impartial penalty-phase verdict.

It is true that a juror who convicted or acquitted a defendant of some criminal charges may be prevented by the Sixth and Fourteenth Amendments from serving on another jury that must decide the guilt of the same defendant for a similar or factually related offence. See United States v. Patterson, 648 F.2d 625, 629 (9th Cir. 1981); Donovan v. Davis, 558 F.2d 201, 202 (4th Cir. 1977); Government of Virgin Islands v. Parrott, 551 F.2d 553, 554 (3rd Cir. 1977). The cases discussed above make it clear, however, that the penalty-phase evaluation of evidence of prior criminal activity is not intended or required to be a separate trial on criminal charges. See also Poland v. Arizona, 476 U.S. 147, 156 (1986) (finding of aggravating circumstance at penalty phase does not convict a defendant of the death sentence). The jury at the penalty phase is charged with selecting the appropriate

sentence, not with deciding whether Coleman is guilty of other offenses. Cf. Tuilaepa, 114 S. Ct. at 2636-37 (California's statutory sentencing factors merely point to issues for the jury to consider).

Coleman has not offered any authority, and the court has found none, for the proposition that a jury that has decided the defendant's guilt may not constitutionally determine his sentence. Based on the cases discussed above, the court concludes that the rule Coleman seeks was not dictated by precedent. Furthermore, such a rule is not necessary to the fundamental fairness of a penalty-phase determination. See, e.g., Tuilaepa, 114 S. Ct. at 2636. This court is thus barred by Teague from creating or applying a rule that would prevent Coleman's guilt-phase jury from deciding at the penalty-phase whether he committed other uncharged criminal offenses.

C. Equal protection

Coleman claims that his sentence violates the Equal Protection Clause and the Eighth Amendment because California's capital sentencing statute affords him fewer procedural protections than non-capital defendants receive under state law. Specifically, he contends that the prosecutor re-litigated at the penalty phase the circumstances of Coleman's prior conviction for false imprisonment. The prosecutor would not have been able to do so in a non-capital case, according to Coleman. In addition, non-capital juries are instructed on the elements of prior criminal conduct that is offered to enhance a sentence, and such conduct must be found unanimously and proven beyond a reasonable doubt. These procedural protections were not provided in Coleman's case.

Respondent answers that Coleman's equal protection argument fails because capital defendants and non-capital defendants are not similarly situated for sentencing purposes. The court agrees.

The essential mandate of the Equal Protection Clause is that "all persons similarly situated should be treated alike." Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). A long line of cases, including those cited by Coleman himself, recognize that "death is different."[59] See e.g., California v. Ramos, 463 U.S. 992, 998-99 and n.9 (1983) and cases cited therein. Thus, "[t]he relevant comparison for equal protection purposes is between two defendants, both of whom are sentenced to death." Massie v. Hennessey, 875 F.2d 1386, 1389 (9th Cir. 1989); see also McCleskey v. Kemp, 481 U.S. 279 (1987) (applying equal protection analysis to claim of racial discrimination in capital sentencing procedures); Johnson v. Louisiana, 406 U.S.356, 364 (1972) (rejecting non-capital defendant's equal protection challenge to non-unanimous jury because a "[s]tate may treat capital offenders differently); Jeffers v. Lewis, 38 F.3d 411, 419 (9th Cir. 1994) (en banc) (rejecting capital defendant's equal protection challenge to judicially imposed sentence because death penalty is qualitatively different from non-death sentence).

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59. The notion that "death is different" is most often asserted where capital defendants seek or receive greater procedural protections than non-capital defendants. Coleman, by contrast, claims that he received fewer procedural rights at his penalty-phase than a California non-capital defendant would have received. The greater quantum of rights required in a capital case as compared to a non-capital case may support a due process or Eighth Amendment challenge. See e.g., Beck v. Alabama, 447 U.S. 625, 637-38 and nn.13, 14 (1980) (due process requires lesser-included-offence instruction in capital cases). For purposes of equal protection analysis, however, it is irrelevant whether capital or non-capital defendants receive greater procedural protections. See Bonin, 794 F. Supp. at 984 (failure to give penalty-phase jury reasonable doubt instruction, which is required to commit a drug or sex offender, does not deny equal protection). But see Williams v. Lynbaugh, 484 U.S. 935, 939-40 (Marshall, J., dissenting from denial of cert.) (Equal Protection Clause bars admission in capital cases of evidence of unadjudicated offenses that would be inadmissible in non-capital cases).

At the time Coleman's conviction became final, equal protection doctrine did not bar relitigation of prior convictions or require instructions on unanimity, the burden of proof or the elements of unadjudicated criminal activity in the penalty phase of a capital case. Because the rule Coleman seeks to have applied was not dictated by precedent, his claim fails under Teague. For the reasons discussed in section 1, above, the court concludes that the exception for "watershed rules of criminal procedure" does not apply here. Alone or in combination, these procedural protections, even if granted to non-capital defendants, are not required by the Equal Protection Clause.

5. Double Jeopardy

Coleman claims that the Double Jeopardy Clause was violated when the prosecutor introduced testimony at the penalty phase about several of Coleman's prior convictions. Respondent answers that the testimony was offered to support a statutory aggravating circumstance, not to convict Coleman or impose a separate penalty. Because it was relevant to show Coleman's prior violent criminality, the evidence was properly introduced at the penalty phase, according to respondent.

The Double Jeopardy Clause of the Fifth Amendment applies to state-court criminal proceedings by way of the Fourteenth Amendment. See Benton v. Maryland, 395 U.S. 784 (1969). The Clause provides three distinct protections. First, it bars subsequent prosecutions for the same offense after the defendant has been acquitted. Second, it bars subsequent prosecutions for the same offense after the defendant has been convicted. Third, it prevents multiple punishment for the same offence. See North Carolina v. Pearce, 395 U.S. 711, 717 (1969). Coleman's challenge falls under the second of these protections. He contends, in essence, that he was prosecuted twice for the same offenses because the

prosecutor at his capital sentencing proceeding introduced testimony about offenses of which he had already been convicted.

The Double Jeopardy Clause protects against successive prosecution regardless of whether the defendant was acquitted or convicted in the first proceeding. See United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1215 (9th Cir. 1994), cert. granted sub nom United States v. Ursery, 116 S. Ct. 762 (1996). It prevents a defendant from "being forced to defend himself against repeated attempts to exact one or more punishments for the same offense." Id.; see also Witte v. United States, 115 S. Ct. 2199, 2204 (1995) (clause protects not only from multiple punishment for the same offense but also from "being twice put in jeopardy for such punishment"). Nonetheless, the Double Jeopardy Clause does not bar the use of prior convictions to enhance non-capital sentences, "even though this means a defendant must, in a certain sense, relitigate in a sentencing proceeding conduct for which he was previously tried." Schiro v. Farley, 114 S. Ct. 783, 789 (1994).

The penalty phase of a capital case differs from a non- capital sentencing proceeding, however, in ways that are significant for purposes of double jeopardy analysis. The former, but not the latter, is a separate proceeding with opening and closing statements, testimony and evidence heard by a jury that must then deliberate and, guided by explicit standards, return one of two verdicts. Significantly, the prosecution at the penalty phase must also establish additional facts to justify sentence of death. See, e.g., Bullington V. Missouri, 451 U.S. 430, 438-39 (1981); Fitzpatrick v. McCormick, 869 F.2d 1247, 3254 (9th Cir. 1989). Thus, a penalty phase is treated as "a trial on the issue of punishment," at least in the context of a double jeopardy challenge to a successive capital sentencing proceeding. See Schiro, 114 S. Ct. at 790;

Bullington, 451 U.S. at 438, 446; Fitzpatrick, 869 F.2d at 1254.

On the other hand, the trial analogy does not extend to the individual aggravating factors to be considered at the penalty phase. "[The] finding of any particular aggravating circumstance does not of itself 'convict' a defendant (i.e., require the death penalty), and the failure to find any particular aggravating circumstance does not 'acquit' a defendant (i.e., preclude the death penalty)." Poland, 476 U.S. at 156. The instant case stretches the analogy even further: In Coleman, the jury was not required to make specific findings on each aggravating factor, let alone each conviction supporting the prior-felony aggravating factor. Cf. id. at 155-56. Thus, Coleman's penalty-phase has only a limited resemblance to a successive trial on his prior felonies. Furthermore, the testimony in this context did not pose the threat of "embarrassment, expense, anxiety, and insecurity, and the possibility that the "defendant] may be found guilty even though innocent a against which the Double Jeopardy Clause was intended to protect. See Schiro, 114 S. Ct. at 789; United States v. DiFrancesco, 449 U.S. 117, 132 (1980); Massie, 875 F.2d at 1388.

Assuming, however, that the penalty phase was tantamount to successive prosecution for the felonies, another barrier remains to finding a double jeopardy violation. The offenses of which Coleman was convicted are not the same, for double jeopardy purposes, as the offenses that were litigated at the penalty phase. Two offenses are not the same if each requires proof of an additional fact that the other does not. See Blockburger v. United States, 284 U.S. 299, 304 (1932). The standard of proof required to establish each of the offenses is a critical component of this analysis. See Durosko v. Lewis, 882 F.2d 357, 360-61 (9th Cir. 1989); Curtis v. Eikenberry, 877 F.2d 802, 803 (9th Cir. 1989). Double jeopardy does not bar relitigation of a defendant's prior convictions if the

burden of proof at the first proceeding was considerably heavier than that in the subsequent proceeding. See Durosko, 882 F.2d at 360; Curtis, 877 F.2d at 803.

In the instant case, it had been established beyond a reasonable doubt at earlier, separate criminal proceedings that Coleman was guilty of the prior felonies.[60] By contrast, there was no similar burden of proof at the penalty phase for either the aggravating circumstance or the underlying convictions. The difference in the burden of proofs at the two proceedings may be dispositive of the double jeopardy issue. See Durosko 882 F.2d at 361; Curtis, 877 F.2d at 803.

For these reasons, Coleman's double jeopardy claim is denied.

6. Death-eligibility procedures

Coleman claims that California's death penalty statute, on its face and as applied in his case, violated due process and the Eighth Amendment because it did not properly narrow the class of death-eligible defendants.[61]

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60. Coleman was convicted of the two sex offenses at a jury trial, at which the prosecution had the burden of proving him guilty beyond a reasonable doubt. It is not clear from the record whether Coleman was convicted of false imprisonment after a trial or on a guilty plea. The difference is irrelevant for double jeopardy purposes: A valid plea of guilty implies either an admission or a finding that there is sufficient evidence to establish the defendant's guilt beyond a reasonable doubt. See, e.g., United States v. Neel, 547 F.2d 95, 96 (9th Cir. 1976); People v. Turner, 171 Cal.App.3d 116, 125 (1985); see also United States v. Faber, 57 F.3d 873 (9th Cir. 1995) (jeopardy attaches when the court accepts a criminal plea agreement).

61. The United States Supreme Court held that California's former death penalty statute comported with the constitutional narrowing requirement. "By requiring the jury to find at least one special circumstance beyond a reasonable doubt, the statute limits the death sentence to a small subclass of capital-eligible cases." Pulley,

The state's statutory list of special circumstances is over inclusive, he argues, and does not provide a principled basis for determining which first-degree murder defendants will be eligible for the death penalty. The error is compounded in his case, according to Coleman, because the same felony was used to support his first-degree murder conviction, the only special circumstances found and an aggravating factor at the penalty phase.

Respondent answers that the California death penalty statute narrows the class of first-degree murderers who are eligible for the death sentence in conformance with constitutional requirements.

The Constitution demands that a state's capital penalty statute "genuinely narrow the class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983). The purpose of the narrowing is to provide a "principled basis" for "distinguish[ing] those who deserve capital punishment from those who do not." Arave v. Creech, 113 S. Ct. 1534, 1542 (1993); Wade v. Calderon, 29 F.3d 1312, 1319 (9th Cir. 1994). To comport with this requirement, a defendant may become eligible for the death penalty only after he is convicted of murder and one special circumstance is found true. See Tuilaepa, 114 S. Ct. at 2634. The circumstance

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465 U.S. at 53. The Court noted, however, that the current death penalty statute, under which Coleman was convicted and sentenced, includes a "greatly expanded" list of special circumstances. Id. at 51 n.13.

In its most recent decision regarding the constitutionality of California's capital sentencing statute, the Court specifically left this issue open. See Tuilaepa, 114 S. Ct. at 2636 (declining to review the special circumstances, which had not been challenged by petitioner); id. at 2639-40 (Stevens and Ginsburg, JJ., concurring) (noting that petitioner did not challenge constitutionality or application of eligibility procedures).

may be either incorporated into the state's definition of murder or defined separately. See Lowenfield v. Phelps, 484 U.S. 231, 246 (1988). "[T]he circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder." Tuilaepa, 114 S. Ct. at 2635; see also Arave, 113 S. Ct. at 1542.

California defines murder as "the unlawful killing of a human being, or a fetus, with malice aforethought."[62] Cal. Penal Code § 187(a). Within this broad category, the statute at the time of Coleman's trial defined two degrees of murder:

> All murder which is perpetrated by means of a destructive device or explosive, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or [lewd and lascivious acts with a minor], is murder of the first degree; and all other kinds of murders are of the second degree.

Cal. Penal Code § 189. Once a California defendant is convicted of first-degree murder, he becomes death-eligible when a jury finds true at least one of 19 statutory special circumstances.[63] See Tuilaepa, 114 S.

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62. The statute exclude legal abortions from the definition. Cal. Penal Code § 187(b).

63. Generally, these special circumstances apply to: murders of certain classes of people (law enforcement officers, firefighters, government officials, prosecutors, judges or witnesses); murder by certain classes of people (previously convicted murderers, multiple murderers); murders with certain motives (financial gain, to avoid arrest or escape from custody, for a victim's "race, color, religion, nationality or country of origin"); murders by certain means (hidden

Ct. at 2636. The aggravating circumstance that is the specific subject of Coleman's challenge applies to murders "committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit" one of nine specified felonies. Cal. Penal Code § 190.2(a)(17).

It is clear that not every defendant convicted of murder under California law is eligible for the death penalty. The statute initially separates potentially-death-eligible first- degree murderers from death-ineligible second-degree murderers. Additionally, before a defendant convicted of first-degree murder may be eligible for the death penalty, the jury must find true at least one special circumstance. California's capital sentencing statute thus complies with the letter of the law: It requires a first-degree murder conviction and a special circumstance finding before a defendant may become eligible for a sentence of death. Two questions remain, however. First, do California's enumerated special circumstances actually and rationally narrow the class of death-eligible defendants?[64] Second, does the statute, as

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or mail bomb, lying in wait, torture or poison, "heinous, atrocious, or cruel"). See Cal. Penal Code § 190.2(a).

64. Coleman has standing to bring this claim as a challenge to California's death penalty scheme as a whole, not just as applied in his case. His claim is, at heart, based on the proscription in Furman v. Georgia, 408 U.S. 238 (1972), against sentencing statutes that do not provide consistent and rational standards for imposing capital punishment. See Gregg v. Georgia, 428 U.S. 153, 188 (1976) (Furman held that capital punishment "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner"). Affirming the standing of a capital defendant to raise a Furman challenge to a federal death-penalty statute, the Ninth Circuit recently noted, "The Supreme Court has not hesitated under Furman to invalidate capital sentencing schemes challenged by defendants who have been convicted of

applied in Coleman's case, satisfy this constitutional requirement?

In California, the special circumstances separate those defendants who may be sentenced to death from those who may not. It is at this level that the narrowing occurs; at this level the statute must provide rational criteria to guide the jury's judgment about whether a particular case exceeds the threshold below which the death penalty may not be imposed. See Romano v. Oklahoma, 114 S. Ct. 2004, 2009 (1994); McCleskey v. Kemp, 481 U.S. 279, 305 (1987).

California's statute gives a broad definition for first-degree murder. See Arave, 113 S. Ct. at 1542-43. It also defines 19 special circumstances, making more categories of murder death-eligible than the statutes of other states in which the issue has been addressed.[65] Furthermore, the special circumstances duplicate virtually all of the categories of first- degree murder except premeditated murder. For example, a murder is classified as first-degree if it is committed by explosive, poison, lying in wait or torture. Cal. Penal Code § 189. The special circumstances also include murder by concealed or mailed explosive and intentional murder by poison, lying in wait or torture. Cal. Penal Code § 190.2. Similarly, a murder committed during

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first-degree murder." United States v. Cheely, 36 F.3d 1439, 1444 n.11 (9th Cir. 1994).

65. See, e.g., Lowenfield, 484 U.S. at 246 (Louisiana: 5 categories); Jurek v. Texas, 428 U.S. 262, 273 (1976) (Texas: 5 categories); Gregg, 428 U.S. at 196-97 (Georgia: 10 categories); Adamson v. Ricketts, 865 F.2d 1011, 1025-26 (9th Cir. 1988) (Arizona: 9 categories); McKenzie v. Risley, 842 F.2d 1525, 1539 (9th Cir. 1988) (Montana: 7 categories); Giarratano v. Procunier, 891 F.2d 483, 489-90 (4th Cir. 1989) (Virginia: 8 categories); see also Pulley, 465 U.S. at 51 n.13 (California's former death penalty statute: 7 categories).

one of five felonies will support both a first-degree murder conviction and a special circumstance.[66]

A conviction for first-degree murder based on one of these methods thus goes a long way toward establishing the corresponding special circumstance that would make the defendant death-eligible. However, it does not necessarily follow that the statute fails to "adequately differentiate[s a death-eligible] case in an objective, evenhanded, and substantially rational way from the many . . . cases in which the death penalty may not be imposed.[67]" Zant v. Stephens, 462 U.S. 862, 879 (1983); cf. McKenzie v. Risley, 842 F.2d 1525, 1539 (9th Cir. 1988) (en banc) (statute "precisely specific[s] the elements that ha[ve] to be found in addition to [first-degree murder] in order to justify imposition of the death penalty (emphasis added)).

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66. Because of the structure of the California death penalty statute, this double use is different from the double use upheld in other cases. In Lowenfield, for example, the Court held that the class of death-eligible defendants was constitutionally narrowed, even though the aggravating factor found at the penalty phase duplicated an element of the capital offence. The relevant statute provided for the requisite the narrowing at the guilt phase; thus, the use of the same element at the penalty phase had no effect on the narrowing process. Lowenfield, 484 U.S. at 246; see also Deputy v. Taylor, 19 F.3d 1485, 1500 (3rd Cir. 1994). But see Johnson v. Dugger, 932 F.2d 1360, 1368 (11th Cir. 1991). Under California's statute, by contrast, the first-degree murder conviction and the special circumstance finding are both part of the narrowing process.

67. Although the statute itself may not specify the distinction between the special circumstance and the first-degree murder, the California Supreme Court has, at least in some instances, mandated a construction that accomplishes the requisite narrowing. See e.g., Calderon v. Prunty, 59 F.3d 1005, 1008-09 (9th Cir. 1995) (lying-in-wait special circumstance, unlike lying-in-wait first-degree murder, requires intent to kill); Williams, 52 F.3d at 1476 (felony-murder special circumstance requires that murder be intended to advance an independent felonious purpose).

This court concludes that California's capital sentencing scheme is not unconstitutional for failing to adequately narrow the class of death-eligible defendants. Its category of first- degree murders is broad and its list of special circumstances expansive and largely repetitive of the first-degree murder criteria. The statute does, however, limit the class of death- eligible murders to those committed under "particularly aggravating circumstances" similar to those upheld in other cases. See United States v. Cheely, 36 F.3d 1439, 1444-45 (9th Cir. 1994). It restricts the class to those with similar levels of culpability and at least the minimum mental state constitutionally required for the imposition of the death penalty. Cf. id. at 1443-45 and nn.9, 15; see also Arave, 113 S. Ct. at 1543. Furthermore, whether considered individually or collectively, the special circumstances do not apply to every first-degree murder. See Tuilaepa, 114 S. Ct. at 2635; Arave, 113 S. Ct. at 1542. For these reasons, the court concludes that California's statute as a whole "allow[s] for a principled distinction between the subset of murders for which the sentence of death may be imposed and the majority of murders which are not subject to the death penalty." Wade, 29 F.3d at 1319.

Coleman also argues that the statute is unconstitutional as applied to him because it makes virtually all first-degree felony-murderers, such as himself, eligible for the death penalty. Coleman's jury was instructed on only one theory of first-degree murder: felony murder, with rape as the underlying felony.

> [T]he unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs as a result of the commission of or attempt to commit the crime of rape, and where there was in the mind of the perpetrator a specific intent to commit such a crime is murder of the first degree.

RT 784 (emphasis added). The only special circumstances it was instructed on and found true were forcible rape and forcible sodomy. Each required proof "that the murder was committed while the defendant was encased in" and "in order to carry out or advance" the commission or attempted commission of the felony. RT 784-85, 794 (emphasis added). "In other words, the special circumstance . . . is not established if the forcible rape attempted or completed or forcible sodomy attempted or completed was merely incidental to the commission of the murder." RT 785. The instructions given at Coleman's trial thus informed the jury that the special circumstances require a finding of an element in addition to those it had found for first-degree felony-murder. See McKenzie, 842 F.2d at 1539. It must find, for the special circumstance to be true, that the murder was committed "to carry out or advance" the rape. With this construction, the special circumstance does not apply to every defendant convicted of first-degree felony-murder.[68] See Arave, 113 S. Ct. at 1543. There is an additional reason to reject Coleman's claim that the special circumstances, as applied in his case, failed to provide the constitutionally required narrowing. His first- degree felony-murder conviction relied on rape as the underlying felony. The jury found true two special circumstances, however: rape and sodomy. Only one special circumstance finding is required for a defendant to become death-eligible. See Cal. Penal Code § 190.2(a). Thus, even if the court accepted Coleman's argument that the rape special circumstance did not constitutionally narrow the felony-murder conviction, the sodomy special circumstance remains a separate and adequate special circumstance to support his death sentence. See Zant, 462

68. The California Supreme Court has held that the felony-murder special circumstance must be given this limiting construction to comply with the constitutional narrowing requirement. See Williams, 52 F.3d at 1476.

U.S. at 879 (upholding death sentence based in part on over broad circumstance where remaining circumstances are adequate to narrow the class); cf. Wade, 29 F.3d at 1322-23 (reversing California death sentence where sole special circumstance is invalid).

7. Safeguard for reliability of death sentence

Coleman claims that his death sentence is constitutionally unreliable because the jury was not properly instructed about how to determine the appropriate sentence. Specifically, he argues that the instructions should have: 1) excluded inapplicable statutory factors and identified which of the remaining factors could be aggravating and which could be mitigating[69]; 2) required the jury to return written findings indicating the aggravating factors it found[70]; 3) required the prosecution to prove beyond a reasonable doubt the aggravating factors and that death was the appropriate sentence[71]; and 4) required the jury to agree unanimously on the aggravating factors on which it relied.[72] He also claims that his sentence violated the Equal Protection clause because it was not subject to proportionality review, as non-capital sentences are under state law.[73] Respondent answers that each of these

69. Contra Tuilaepa, 114 S. Ct. at 2638-39; Williams, 52 F.3d at 1481; Bonin, 59 F.3d at 848.

70. Contra Harris v. Pulley, 692 F.2d 1189, 1195-96 (9th Cir. 1982), rev'd on other grounds, 465 U.S. 37 (1984).

71. Contra id. at 1194-95.

72. But see discussion, above, regarding unanimity requirement for prior-criminal-conduct aggravating factor.

73. But see discussion, above, regarding equal protection challenge to prior-criminal-activity aggravating factor; but cf. Pulley v. Harris, 465 U.S. 37, 44 (1984) (Eighth Amendment does not

subclaims is barred by Teague and/or is not a valid constitutional claim.

Coleman did not address this claim in his post-hearing briefing. The court concludes that he has abandoned the claim. See Acosta-Huerta, 7 F.3d at 142. The court will not discuss it in this opinion; however, it does note that the claim appears to be without merit.

8. Commutation instruction

Petitioner argues that a jury instruction about the governor's commutation power rendered his death sentence constitutionally unreliable. He claims that the instruction gave the jury inaccurate information about its sentencing options in his case. Relying on Hamilton v. Vasquez, 17 F.3d 1149 (9th Cir.), cert. denied 114 S. Ct. 2706 (1994), in which the Ninth Circuit reversed a death sentence because a somewhat similar instruction had been given, Coleman contends that his sentence violates the Eighth and Fourteenth Amendments.

Respondent argues that the instruction given in Hamilton is distinguishable from the one at issue here. He maintains that the commutation instruction given in this case was more similar to the one upheld in California v. Ramos, 463 U.S. 992, 995-96 (1983), than to the instruction given in Hamilton. Respondent also argues that the instruction did not prejudice Coleman.

A. Background

The relevant facts are undisputed. The trial court instructed Coleman's jury about commutation procedures as follows[74]:

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require proportionality review under California's capital sentencing scheme).

74. Because the penalty-phase jury-instruction conference was not recorded, the genesis of this instruction is not clear. It appears from a later colloquy that Keane initially objected to any commutation instruction. See 11/20/81 RT 18-19. The record does not indicate the basis for his objection. Cf. Hamilton, 17 F.3d at 1160-61 (counsel objected in part because defendant was a twice-convicted felon). When the trial court decided to give the instruction, Keane apparently asked that the jury also be instructed not to consider or speculate about parole. 11/20/81 RT 18-19; see Hamilton, 17 F.3d at 1161 (prosecutor asked for instruction, including directions not to consider or speculate about commutation).

You are instructed that under the State Constitution, a Governor is empowered to grant a reprieve, pardon or commutation of a sentence following conviction of the crime.

Under this power, a Governor may in the future commute or modify a sentence of life imprisonment without the possibility of parole to a lesser sentence that would include the possibility of parole.

So that you will have no misunderstandings relating to a sentence of life without possibility of parole, you have been informed generally as to the Governor's commutation modification power. You are now instructed, however, that the matter of a Governor's commutation power is not to be considered by you in determining the punishment for this defendant.

You may not speculate as to if or when a Governor would commute the sentence to a lesser one which includes the possibility of parole.

RT 1059-60. Because Coleman has at least two prior felony convictions, however, the governor alone does not have the power to modify his sentence. Under California law, the governor must consult the Board of Prison Terms and obtain the approval of four judges of the California

Supreme Court before modifying the sentence of a twice-convicted felon. See Cal. Const. Art. 5, § 8; Cal. Penal Code §§ 4802, 4813; Hamilton, 17 F.3d at 1162; cf. Ramos, 463 U.S. at 1010 n.24 (California Constitution and its implementing statutes give the governor "broad authority to reprieve, pardon, or commute sentences").

B. Applicable law

The Eighth Amendment imposes a heightened standard of reliability on the procedures by which a capital sentencing decision is made. See Gilmore, 113 S. Ct. at 2117; Hamilton, 17 F.3d at 1159. To this end, due process and the prohibition against cruel and unusual punishment require that the discretion of the capital sentencer be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Hamilton, 17 F.3d at 1159-60 (quoting Gregg v. Georgia, 428 U.S. 153, 189 (1976)). A sentencer must thus make "an individualized determination on the basis of the character of the individual and the circumstances of the crime." Tuilaepa, 114 S. Ct. at 2635 (quoting Zant, 462 U.S. at 878). This individualized review is a "constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (opinion of Stevens, Stewart and Powell, JJ.); see also Lockett v. Ohio, 438 U.S. 586, 604 (1978) (opinion of Burger, C.J., Stewart, Powell and Stevens, JJ.). To satisfy this requirement, a capital sentencing procedure must allow the jury to consider all relevant mitigating evidence offered by the defendant. See Penry v. Lynaugh, 492 U.S. 302, 317 (1989); Lockett, 438 U.S. at 604; Woodson, 428 U.S. at 304.

A penalty-phase instruction violates the Eighth and Fourteenth Amendments if there is a reasonable likelihood that the jury applied the instruction in such a way that prevented consideration of relevant mitigating

evidence. See Boyde, 494 U.S. at 380; Hamilton, 17 F.3d at 1160; see also Carriger v. Lewis, 971 F.2d 329, 334 (9th Cir. 1992) (due process error if it is reasonably likely that the jury applied an instruction in a way that violates a constitutional right). An instruction may not "prevent[] the jury from giving a reasoned moral response to the petitioner's mitigating evidence . . . or create[] the risk that the death penalty would be imposed despite evidence which may call for a life sentence." Hamilton, 17 F.3d at 1160 (citations omitted); see also Gilmore, 113 S. Ct. at 2118.

The Eighth and Fourteenth Amendments require, in addition, that the sentencing information presented to the jury be accurate. "[A]ccurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die." Gregg, 428 U.S. at 190 (opinion of Stevens, Stewart and Powell, JJ.); see also, e.g., Simmons, 114 S. Ct. at 2195 n.5 ("the state may not mislead the jury by concealing accurate information about the defendant's parole eligibility"); Johnson v. Mississippi, 486 U.S. 573, 590 (1988) (Eighth Amendment requires reversal where jury considered evidence that was "materially inaccurate"); Gardner v. Florida, 430 U.S. 349 (1977) (due process violated where death sentence might have been based in part on erroneous or inaccurate information that was not disclosed to defendant).

Applying these principles in accordance with Hamilton[75] to the instant case, this court concludes that the commutation instruction given at Coleman's trial rendered his sentence unconstitutional.

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75. The court recognizes that Hamilton was a 2 to 1 decision and that the dissent raises substantial question as to whether the majority correctly followed the principles set forth in Ramos. However, this court is bound by the decision in Hamilton and believes its decision here is faithful to the principles set forth in the majority's analysis of the commutation instruction given in Hamilton.

C. Analysis

In considering variations on the commutation instruction, the Supreme Court and the Ninth Circuit have focused on how accurately the instruction informs the jury about its sentencing options.[76] See Ramos, 463 U.S. at 1009; Hamilton, 17 F.3d at 1160. In Ramos, the Court held that capital sentencing juries are not constitutionally precluded from considering the possibility of commutation. Ramos, 463 U.S. at 1001-03. The Ramos Court first rejected arguments that the two-sentence instruction about the governor's commutation power was irrelevant to the capital sentencing decision.[77] It held that the possibility that the defendant would be paroled, like the possibility that the defendant would be dangerous in the future, was a proper capital sentencing consideration. Id. at 1002-03. It also held that the commutation instruction does not diminish the reliability of the sentence because it "gives the jury accurate information. " Id. at 1004.

The Court also held that the instruction did not divert the jury's attention from an appropriately individualized

76. For a summary of the history of California's commutation instruction, see Hamilton, 17 F.3d at 1160 and nn.1, 2.

77. The instruction given in Ramos was:

> You are instructed that under the State Constitution a Governor is empowered to grant a reprieve, pardon, or commutation of a sentence following conviction of a crime.
>
> Under this power a Governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole.

Ramos, 463 U.S. at 995-96. This instruction is identical to the first two sentences of the commutation instruction given at Coleman's trial.

consideration of the crime and the defendant. The instruction, according to the Court, "focuses the jury's attention on whether this particular defendant is one whose possible return to society is desirable." Id. at 1005. Again, the Court emphasized that the instruction "was merely an accurate statement of a potential sentencing alternative." Id. at 1009. It "corrects a misperception" that a defendant sentenced to life without the possibility of parole could never be paroled and "supplies the jury with accurate information for its deliberation in selecting an appropriate sentence." Id.

The Ramos instruction is inaccurate, however, when applied to twice-convicted felons, such as Hamilton and Coleman. See Hamilton, 17 F.3d at 1163. In Hamilton, the trial court tried to clarify the commutation procedures that would apply in that case. The resulting instruction accurately stated that the governor alone could not commute Hamilton's life sentence.[78] Id. at 1161. On the

78. The trial court in Hamilton gave the two-sentence Ramos instruction, with the following addition:

> This is subject to the requirement that, in the case of any person twice convicted of a felony, a commutation or modification may not be granted absent the written recommendation of at least four justices of the California Supreme Court. Further, a life sentence requires a minimum incarceration of 25 years less one-third off for good time credits before parole may be considered by the proper authorities. You are now instructed, however, that the matter of a possible commutation or modification of sentence is-not to be considered by you in determining the punishment for Mr. Hamilton. You must not speculate as to whether such commutation or modification would ever occur. It is not your function to decide now whether this man will be suitable for parole at some future date. So far as you are concerned, you are to decide only whether this man shall suffer the death penalty or whether he shall be permitted to remain alive. If upon consideration of the evidence you believe that life imprisonment without possibility of parole is the proper sentence, you must assume that the Governor, the Supreme Court, and those officials charged with the operation of our parole system will perform

other hand, it also fostered an inaccurate impression that Hamilton would be eligible for release in less than 17 years, encouraged the jury to speculate about the possibility of parole and focused its attention on commutation. Id. at 1162-63. The Ninth Circuit concluded that this instruction violated due process and the Eighth Amendment. Id. at 1160. Interpreting Ramos, the Ninth Circuit stated, "[i]f a [commutation] instruction is inaccurate or misleading it will not be upheld." Hamilton, 17 F.3d at 1160.

It also held that the trial court did not cure the error by instructing the jury not to consider commutation. "Here, where the trial court told the jury not to consider what it had just been instructed were relevant considerations, the jury must have been misled." Id. at 1163; See Simmons, 114 S. Ct. at 2197 (instruction not to consider availability of parole confused and frustrated the jury in light of arguments about future dangerousness "and the obvious relevance of petitioner's parole ineligibility to the jury's formidable sentencing task").

The instruction before this court, although shorter and less confusing than the one given in Hamilton, suffered from the same constitutional infirmity. It was inaccurate as applied to Coleman. It purported to correct "misunderstandings" about the meaning of life without the possibility of parole (RT 1060); instead, however, it gave incomplete and potentially misleading information to the jury about its non-death sentencing option. The instruction spoke of the power of the governor, and the governor

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their duty in a correct and responsible manner, and that Mr. Hamilton will not be paroled unless he can safely be released into society. It would be a violation of your duty as jurors if you were to fix the penalty at death because of a doubt that the Governor and other officials will properly carry out their responsibilities.

Hamilton, 17 F.3d at 1161-62.

alone, to commute Coleman's sentence. It made no mention of the requirement of consultation with the Board of Prison Terms or of the California constitutional requirement of the concurrence of four Supreme Court justices. Further, by directing the jury not to speculate, it "invited the jury to assume that the question of [the defendant's] release would automatically come before" the governor. Hamilton, 17 F.3d at 1161. The instruction was confusing in that it first instructed the jury about the governor's power of commutation and then, inconsistently, directed the jury not to consider what it had just been told. Id. at 1161.

Because the instruction as given did not tell the jury that there were severe limitations on the governor's power to commute Coleman's sentence, it was inaccurate and potentially misleading and thus cannot be upheld according to the principles set down in Hamilton. Coleman was entitled, under the Eighth and Fourteenth Amendments, to a sentencing jury that could fairly review the evidence he presented to show that he should not be sentenced to death. See e.g., Boyde, 494 U.S. at 377-78; Lockett, 438 U.S. at 605. Considered in light of the prosecution argument, the aggravating evidence and the record as a whole, the commutation instruction would likely have prevented the jury from giving due effect to Coleman's mitigating evidence. See Hamilton, 17 F.3d at 1163; cf. Boyde, 494 U.S. at 370.

Believing that the governor could, single-handedly, render Coleman eligible for parole, for example, the jury would have found it difficult to give "a reasoned moral response" to testimony about Coleman's temper and his history of incarceration that was introduced to explain his behavior. See Hamilton, 17 F.3d at 1160. During its deliberation, the jury requested a copy of Coleman's prior felony convictions, which nuggets that it gave them considerable weight. RT 1068-72. Yet the instruction prevented the jury from learning that Coleman's prior

convictions not only weighed against him in aggravation but also made parole considerably less likely. See Ramos, 463 U.S. at 1008 (penalty- phase jury may consider many factors in determining whether death is the appropriate punishment); see also Penry, 492 U.S. at 324 (penalty-phase instruction unconstitutionally allowed jury to give aggravating, but not mitigating, effect to evidence of petitioner's mental retardation).

The need for accurate parole-related instructions is heightened when the prosecution argues the issue of a defendant's future dangerousness.[79] See Simmons, 114 S. Ct. at 2194 (due process violated when trial court refused to give accurate parole-eligibility instruction to rebut prosecution's argument about future dangerousness). Here, the prosecutor built his penalty-phase case around Coleman's prior felonies and his propensity for violence, both in and out of prison. His closing argument, in particular, told the jury that Coleman "has already demonstrated what he is capable of doing on numerous occasions to each and every one of us. . . . He is manipulative, he is dangerous to all of us." RT 1011-12, 1029-30; see Simmons, 114 S. Ct. at 2190-91 (prosecutor alluded to future dangerousness by arguing that death sentence would be "a response of society to someone who is a threat); Hamilton, 17 F.3d at 1162 (prosecutor argued that Hamilton would be "conniving and devising ways to manipulate the system and get out). This argument may have caused the jury to speculate about the possibility that

79. Under California law, the prosecutor could not present evidence of future dangerousness directly because it was not one of the statutorily enumerated aggravating factors. See Cal. Penal Code § 190.3; Coleman, 46 Cal.3d at 787. As the Ramos Court noted, however, there is a strong connection between future dangerousness and parole eligibility in the capital sentencing context. See Ramos, 463 U.S. at 1003 n.17.

Coleman would be released if he were not sentenced to death.

Because the instruction, in the context of Coleman's penalty-phase proceeding, gave the jury inaccurate information and potentially diverted its attention from the mitigation evidence presented, his death sentence violates the Eighth and Fourteenth Amendments: "The jury in this case deliberating under these instructions could not have made the constitutionally mandated reasoned and informed choice between a sentence of life imprisonment without possibility of parole and a sentence of death." See Hamilton, 17 F.3d at 1164. The court therefore grants the writ of habeas corpus as to Coleman's sentence. New penalty proceedings must be held.

DATED: 3/27/97

RONALD M. WHYTE
United States District Judge

(3) ORIGINAL

Supreme Court, U.S.
FILED
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No. 98-437

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1998

ARTHUR CALDERON,

Petitioner,

vs.

RUSSELL COLEMAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CALIFORNIA

BRIEF IN OPPOSITION

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INTRODUCTION

This is a capital case. At the penalty phase of the trial, the jury had two sentencing options: death or life without the possibility of parole. The court instructed the jury that if it sentenced respondent to life without the possibility of parole, the Governor of California had the full and unfettered power to commute the sentence to life **with** the possibility of parole.

The instruction was clear and unambiguous. It was also **incorrect**. Under California law, the Governor does **not** have the unrestricted authority to commute a sentence if, as here, the prisoner has two or more prior felony convictions. In such a case, a prisoner seeking commutation must clear more and higher hurdles, including the consent of the California Supreme Court and the Board of Prison Terms. The jury, unaware of these obstacles to commutation, sentenced respondent to death.

In the district court, the State of California argued that the instruction, even though erroneous, was not cause for reversal under the facts of this case, citing Brecht v. Abrahamson, 507 U.S. 619 (1993). This was so, the state asserted, because the prosecutor never linked the need for execution to the possibility that respondent might be paroled. District court Judge Ronald M. Whyte reviewed the record and rejected both contentions.

To the contrary, after reviewing the entire record the district court held that the prosecutor "built his penalty-phase case around Coleman's prior felonies and his propensity

for violence, both in and out of prison." Appendix to Petition for Writ of Certiorari ("State Appendix") at 150. After reviewing the entire record, the court ruled penalty phase relief appropriate "in light of the prosecution argument, the aggravating evidence and the record as a whole . . . ." State Appendix at 149.

The State appealed. Once again it argued that the error was not reversible because, under Brecht, it did not have "a substantial and injurious effect or influence" on the jury's decision to sentence respondent to death. State Appendix at 32. As in the district court, the State claimed the erroneous instruction was inconsequential to the death sentence because the prosecutor never argued that respondent should be executed because he might be released one day. A panel of the Ninth Circuit Court of Appeals consisting of Judges Thompson, Brunetti, and Schroeder unanimously rejected the State's argument. Writing for the Court, Judge Thompson ruled "the district court did not err in holding that Coleman was denied due process by the state trial court's inaccurate commutation instruction." State Appendix at 33.

The State now seeks review in this Court. For a third time the State recycles its factual assertion that the prosecutor never linked the need for execution to the possibility that respondent might be freed from prison. Petition for Certiorari at 12. This argument -- firmly rejected by the district court -- is the cornerstone of the State's claim that the panel has fashioned an "aberrant" rule of automatic reversal for instructional error. Petition for Certiorari at 9.

In fact, the State dramatically overstates the nature of Judge Thompson's ruling. The Court of Appeal neither ignored nor failed to apply Brecht in this case. Instead, the panel cited and relied upon Brecht in unanimously affirming the order of the district court. State Appendix at 32-33. The district court, in turn, thoroughly reviewed the record of the case and found the error reversible based on the particular facts of this case. Contrary to the State's argument, neither the district court nor the Court of Appeals invoked a rule of automatic reversal in this case. Moreover, as the state's own analysis shows, the instructional error which occurred in this case has not occurred since 1984 and is present in only one other case which occurred prior to that date.

In sum, this case presents no issue worthy of this Court's consideration. Certiorari should be denied.

STATEMENT OF FACTS

At the penalty phase, the jury had a choice of two sentences: life without possibility of parole or death. The jury was then given the so-called "Briggs" instruction. This explained that if the jury chose the life **without** parole option, the Governor had full power to commute the sentence to a lesser one which would **include** the possibility of parole. RT 1059-1060.[1]

There is no dispute that under the circumstances of this case, the Briggs instruction was fundamentally inaccurate. Because respondent had suffered prior felony convictions, the Governor did **not** have the unfettered power to commute his sentence.

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[1] The entire instruction read as follows:

> You are instructed that under the State Constitution, a Governor is empowered to grant a reprieve, pardon or commutation of a sentence following conviction of the crime.
>
> Under this power, a Governor may in the future commute or modify a sentence of life imprisonment without the possibility of parole to a lesser sentence that would include the possibility of parole.
>
> So that you will have no misunderstandings relating to a sentence of life without possibility of parole, you have been informed generally as to the Governor's commutation modification power. You are now instructed, however, that the matter of a Governor's commutation power is not to be considered by you in determining the punishment for this defendant.
>
> You may not speculate as to if or when a Governor would commute the sentence to a lesser one which includes the possibility of parole. RT 1059-1060.

Instead, substantial additional hurdles would have to be crossed before respondent could ever be paroled. First, the Governor would have to forward respondent's application for pardon or commutation to the Board of Prison Terms. The Board of Prison Terms, in turn, would have to prepare a written recommendation. If the Board recommended to deny commutation, the application could not proceed absent special circumstances. If the Board recommended commutation, the application would then be forwarded to the California Supreme Court. Unless a majority of justices recommended a disposition in respondent's favor, the application could not proceed. If a majority of the supreme court recommended a favorable disposition, then -- and only then -- would the Governor have the power to commute. The Governor could then decline to exercise that power. Cal. Pen. Code sections 4802, 4813, 4850, 4851, 4852, 4852.16; Cal. Const. Art. 5, section 8.

The State does not dispute that the jury which decided whether respondent would live or die was never advised as to any of these limitations on the Governor's power to commute. Nor does the State dispute that the prosecutor capitalized on the inaccurate instruction by introducing documents and testimony about respondent's prior convictions.

Instead, the state repeats the factual assertion it made below, suggesting "the issue of life or death was never connected to the possibility that petitioner [sic] would leave prison." Petition for Certiorari at 12. The lower courts rejected this assertion; as the district court

explicitly concluded, "the prosecutor built his penalty-phase case around Coleman's prior felonies and his propensity for violence, both in and out of prison." State Appendix at 150.

The record amply supports this finding. During his closing argument, the prosecutor again and again focused upon respondent's prior convictions, repeatedly drawing the jury's attention to the potential danger respondent would pose not merely in prison, but to society at large. The prosecutor argued death was appropriate because respondent "has already demonstrated what he is capable of doing on numerous occasions to each and every one of us." RT 1012. Death was appropriate because respondent "is manipulative, he is dangerous to all of us." RT 1012. Respondent "has demonstrated his inability to coexist with us in society . . . ." RT 1026. After specifically focusing on respondent as a potential danger to others in prison (RT 1029), the prosecutor broadened his argument and "implore[d]" the jury to impose death not only because respondent might be a danger in prison, but "for our benefit" as well. RT 1030.

In the district court respondent proffered evidence showing that the penalty phase jury accepted the prosecutor's invitation and discussed the possibility of parole in determining if respondent should die. In fact, discussions regarding the possibility that respondent would be

paroled were the "most significant part of the [penalty phase] discussions." See Coleman v. Calderon, No. 89-1906 RMW, Respondent's Motion to Expand Record (filed January 5, 1995). This evidence did not leave the matter in doubt; according to juror Verda New, the possibility of parole was a much discussed topic in deciding whether respondent should live or die:

> "[The jurors] openly discussed that Russell Coleman would be released from prison unless we sentenced him to death. Several jurors stated that he could be paroled if we sentenced him to life in prison. . . . Many of the jurors expressed their fear that if we failed to sentence Mr. Coleman to death, the courts or the Governor could allow him to be released from prison. This was the most significant part of our discussions regarding the appropriate penalty." Ibid.[2]

Relying on the Ninth Circuit's opinion in Hamilton v. Vasquez, 17 F.3d 1149 (9th Cir. 1994), the district court concluded that the instruction violated the Eighth Amendment because it was both inaccurate and misleading. In light of respondent's prior convictions, and the fact that "the prosecutor built his penalty-phase case around Coleman's prior felonies and his propensity for violence, both in and out of prison," the district court concluded that the inaccurate Briggs instruction prevented the jury from giving a reasoned moral response to the penalty phase evidence and argument. Accordingly, the court granted the writ and

[2] Later, New testified in a deposition where the state's attorney h[illegible] full opportunity to cross-examine her about these statements. See Coleman v. Calderon, No. 89-1906 RMW Deposition of Verda New (filed on April 15, 1996). Although the district court later excluded New's evidence at the state's insistence, at the deposition New affirmed under oath that her declaration accurately described the jury's discussion of the possibility that respondent would be released from prison even if he was sentenced to life without parole. Id. at 20-21. The state has never countered this evidence.

ordered a new penalty phase. State's Appendix at 142-151. The panel adopted this rationale and affirmed the grant of penalty phase relief. State Appendix at 28-33. In reaching this result, the panel found that the error was prejudicial in this case, citing this Court's decision in Brecht v. Abrahamson, 507 U.S. 619. State Appendix at 32.

The state seeks review. The state concedes that it does **not** seek review on "[t]he question whether inaccurate penalty phase information about commutation violates the Eighth Amendment . . . ." Petition for Certiorari at 11, n.5. Instead, the state contends that the panel's application of Brecht to this error was flawed.

This contention is hardly novel. In fact, this is the second time the state has sought review of this identical question. In Hamilton v. Vasquez, 17 F.3d 1149 the state sought certiorari alleging that Brecht had not been properly applied to this identical error. Calderon v. Hamilton, No. 93-1652, State's Petition for Writ of Certiorari at i-ii, 24-51. This Court denied certiorari. Calderon v. Hamilton, 512 U.S. 1220 (1994).

The State now recycles this argument. Seeking to make this case worthy of review, however, the state suggests with alarm that the panel broadly held Brecht v. Abrahamson, 507 U.S. 619 need not be applied to state court instructional errors. Petition for Certiorari at i. Instead, it "announced an unauthorized rule automatically reversing a state judgment for trial error." Petition for Certiorari at 7. Finally, certiorari is required, the state argues, because "[t]he precedential effect of this extraordinary Ninth Circuit rule is . . . potentially

devastating . . . ." Petition for Certiorari at 14. Curiously, the state never sought rehearing to ask the panel to reconsider what the state now claims was a watershed ruling abandoning the rule in Brecht.

REASONS FOR DENYING THE WRIT

We start with two points of agreement. First, it was clear error to instruct the jury that the governor alone could commute respondent's sentence to make him eligible for parole. Because the governor had no such power, this instruction gave the jury fundamentally inaccurate information about the only non-death option in this case. As Judge Thompson held for the unanimous panel, and as respondent does not now dispute, the instruction "dramatically overstates the possibility of commuting the life sentence of a person such as Coleman . . . ." State Appendix at 31. Second, the District Court found that the prosecutor "built his penalty-phase case" around respondent's "propensity for violence, both in and out of prison." State Appendix at 150.[3]

On this record, review of the panel's harmless error analysis is unwarranted. First, the panel did not refuse to apply Brecht v. Abrahamson, 507 U.S. 619. State Appendix at 32-33. Nor did it "announce[] an unauthorized rule automatically reversing a state judgment

[3] The state suggests that the instruction was "ambiguous." Petition for Certiorari at i. To say that an instruction is "ambiguous" means that it is capable of two or more different interpretations. The instruction in this case was not ambiguous, it was clear as a bell. It was also wrong.

for trial error." Instead, the panel cited and applied Brecht and held that the particular error in respondent's case -- where a capital sentencing jury was given false and misleading information about the only non-death option presented to it -- satisfied Brecht. State Appendix at 32-33. In addition, and setting aside the state's dramatic hyperbole, the precedential impact of the ruling in this case is not only not "devastating," but **by the state's own admission**, is now limited to a universe of one case.

These arguments are set out more fully below. Contrary to the state's assertion, the sky is not falling because of Judge Thompson's decision in this case. Certiorari should be denied.

ARGUMENT

I. BECAUSE JUDGE THOMPSON CITED AND FAITHFULLY APPLIED BRECHT V. ABRAHAMSON, 507 U.S. 619 TO THE ERROR IN THIS CASE, CERTIORARI IS UNWARRANTED.

At the penalty phase in this case, the jury was told to choose between a sentence of life without parole or death. As the panel accurately noted, the jury was then instructed that if it selected the life without parole option, the governor alone could commute respondent's sentence to one that would include parole as an option. State Appendix at 28-29.

As all now agree, and the panel held, this information was false. State Appendix at 29-32. Because of respondent's prior record, the governor had no such power. Ibid. The jury never knew this.

The jury did know, however, that respondent had prior convictions. Moreover, the jury also knew that the prosecutor repeatedly asked it to impose death because of respondent's "propensity for violence, both in and out of prison." State Appendix at 150; RT 1012, 1026, 129, 1030. During its deliberations, the jury even asked to see a copy of the documents which proved respondent's prior convictions. RT 1068-1072. As the district court found, however, the jury did not know that these very same convictions -- used so forcefully by the prosecutor in arguing that respondent would be a danger if released -- actually "made parole considerably less likely." State Appendix at 150.

In assessing the propriety of the Brecht analysis in this case, it is critical to understand the consequences of the trial court's error. Because of the inaccurate instruction, the jury deciding whether respondent would live or die in this case (1) could not give mitigating effect to penalty phase evidence (2) was "misinform[ed] . . . about the nature of one sentencing option" and (3) "no longer underst[ood] the choice they [were] asked to make." State Appendix at 31, 150. This Court has long recognized that such errors are extremely prejudicial in the context of the normative decisions which a jury must make in determining if a defendant will live or die. See e.g., Penry v. Lynaugh, 492 U.S. 302 (1989)(new penalty phase required where penalty phase instructions precluded jury from

giving mitigating effect to penalty phase evidence); Lockett v. Ohio, 438 U.S. 586 (1978)(same); Simmons v. South Carolina, 512 U.S. 154 (1994) (new penalty phase required where jury was given inaccurate information about one of two sentencing options in capital case); Caldwell v. Mississippi, 472 U.S. 320 (1986)(same).

The state does not take issue with any of these conclusions. Petition for Certiorari at 11, n.5. Instead, it argues that Judge Thompson's analysis under Brecht was insufficient because it did not detail "the trial context of the error." Petition for Certiorari at 12.

Contrary to the state's implicit suggestion, however, Brecht does not require that federal courts employ any particular magic words. Contrary to the state's explicit suggestion, the federal courts in this case neither applied a rule of "automatic reversal" nor refused to apply Brecht v. Abrahamson, 507 U.S. 619.

For example, the district court performed a detailed review of the penalty phase evidence presented and the prosecutor's argument for death and granted penalty phase relief "in light of the prosecution argument, the aggravating evidence and the record as a whole." State Appendix at 149; see State Appendix at 142-151. In turn, Judges Thompson, Brunetti and Schroeder looked at the consequences of the error on the facts of this case, explicitly cited Brecht v. Abrahamson, 507 U.S. 619, and concluded that the district court did not err in finding the error had a "'substantial and injurious effect or influence on the jury's sentence of death.'" State Appendix at 32. As noted, these conclusions are consistent with every case

this Court has ever decided involving errors which either precluded consideration of mitigating evidence or provided inaccurate information about the consequences of a particular sentence choice. See Simmons v. South Carolina, 512 U.S. 154; Penry v. Lynaugh, 492 U.S. 302; Caldwell v. Mississippi, 472 U.S. 320: Lockett v. Ohio, 438 U.S. 586. Moreover, and once again contrary to the state's suggestion, the panel did not "announce[] an unauthorized rule automatically reversing a state judgment for trial error." Instead, given the consequences of the state court's error discussed above and the prosecutor's repeated reliance on respondent's danger to the community, the panel properly upheld the district court's conclusion that Brecht had been satisfied.

This ruling not only follows this Court's precedents, but follows the Circuit's precedents as well. Various panels of the Ninth Circuit have made clear time and again that the Brecht standard of prejudice is to be applied to constitutional errors which occur in state court. See, e.g., Franklin v. Henry, 122 F.3d 1270 (9th Cir. 1997)(applying Brecht to evidentiary error); Hanna v. Riveland, 87 F.3d 1034 (9th Cir. 1996)(instructional errors); Thompson v. Borg, 74 F.3d 1571 (9th Cir. 1996)(jury misconduct); Pope v. Zenon, 69 F.3d 1018 (9th Cir. 1996)(Miranda violation); Lee v. Marshall, 42 F.3d 1296 (9th Cir. 1994)(jury misconduct); Hardnett v. Marshall, 25 F.3d 875 (9th Cir. 1994)(prosecutorial misconduct); Wade v. Calderon, 29 F.3d 1312, 1322 (9th Cir. 1994)(instructional error). Because the Brecht analysis in this case fit squarely within the precedents of this Court and the Circuit alike, certiorari is unwarranted.

II. BECAUSE THE ERROR IN THIS CASE INVOLVES AN INSTRUCTION UNIQUE TO CALIFORNIA CASES, AN ERROR WHICH REMAINS IN ONLY ONE PENDING CASE OTHER THAN THIS ONE, CERTIORARI IS UNWARRANTED.

Certiorari is unwarranted for a second reason as well. The error in this case was in the trial court's provision of the so-called Briggs instruction **in a case where the defendant had two or more prior convictions**. Only in such a case is the instruction inaccurate.

Significantly, however, under state law the Briggs instruction has not been given in any California case since 1984. See People v. Ramos, 37 Cal.3d 136 (1984)(holding that Briggs instruction was no longer to be given). Moreover, as the state itself has advised this Court, prior to 1984 the instruction was given in a total of only four cases involving prior felons. Calderon v. Hamilton, No. 93-1652, State's Petition for Writ of Certiorari at 17 (citing, in addition to the then pending Hamilton case, People v. Coleman, 46 Cal.3d 749 (1988), People v. McLain, 46 Cal.3d 97 (1988) and People v. Whitt, 51 Cal.3d 620 (1990).)

Prior to this case, the Ninth Circuit had granted relief in two of these four cases. See McLain v. Calderon, 134 F.3d 1383 (9th Cir. 1998); Hamilton v Vasquez, 17 F.3d 1149. This Court has denied certiorari in Hamilton. Calderon v. Hamilton, 512 U.S. 1220. The Court has denied certiorari in McLain. Calderon v. McLain, ___ U.S. ___, 1998 W.L. 289408 (October 13, 1998).

Thus, by the state's own count, the ruling in this case now impacts only one remaining case, People v. Whitt, 51 Cal.3d 620. It is difficult to imagine a more limited universe of cases on which to predicate a request for certiorari. That request should be denied.

CONCLUSION

The issue in this case involves an instruction unique to California law. It impacts a total of one other case. Moreover, far from "announc[ing] an unauthorized rule automatically reversing a state judgment for trial error," Judge Thompson's opinion for the unanimous panel cited Brecht, applied Brecht and concluded that the error had a "'substantial and injurious effect or influence on the jury's sentence of death.'" The state's Petition for Writ of Certiorari should be denied.

DATED: 10/3/93

Respectfully submitted,

GARDNER & DERHAM
CLIFF GARDNER
ROBERT DERHAM

By Cliff Gardner
Counsel of Record

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CERTIFICATE OF SERVICE

I, Christiana G. Hoffman, am over 18 years of age. My business address is Ghirardelli Square, 900 North Point, San Francisco, California, 94109. I am not a party to this action.

On October 13, 1998 I served the within

BRIEF IN OPPOSITION

upon the party named below by depositing a true copy in a United States mailbox in San Francisco, California, in a sealed envelope, postage prepaid, and addressed as follows:

Morris Beatus
Office of the Attorney General
50 Fremont St., Ste. 300
San Francisco, CA 9105

I declare under penalty of perjury that the foregoing is true.

Executed on October 13, 1998, in San Francisco, California.

Christiana G. Hoffman

GARDNER & DERHAM
ATTORNEYS AT LAW
GHIRARDELLI SQUARE
900 NORTH POINT, SUITE 220
SAN FRANCISCO, CA 94109
TEL: (415) 922-9404
FAX: (415) 922-4310

October 13, 1998

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Calderon v. Coleman, No. 98-437

Dear Sir or Madam:

Enclosed for filing in the above captioned case please find the original and 12 copies of respondent's Brief in Opposition. I have also enclosed the original and one copy of respondent's Motion to Proceed in Forma Pauperis.

There is an extra copy of each document for endorsement and return in the enclosed self-addressed stamped envelope.

Please feel free to call me if there are any questions.

Sincerely,

Cliff Gardner
for GARDNER & DERHAM

Encl.

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Per Curiam

SUPREME COURT OF THE UNITED STATES

ARTHUR CALDERON, WARDEN *v.*
RUSSELL COLEMAN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 98–437. Decided December 14, 1998

PER CURIAM.

After a jury trial in a state court in California, respondent Russell Coleman was convicted of the September 5, 1979, rape, sodomy, and murder of Shirley Hill. The jury's two special circumstances findings of rape and sodomy made Coleman death-penalty eligible under California law. See *People* v. *Coleman*, 46 Cal. 3d 749, 756–757, 759 P. 2d 1260, 1264 (1988).

At the penalty phase of Coleman's trial, the trial judge gave the jury a so-called Briggs instruction, then required by California law, which informed the jury of the Governor's power to commute a sentence of life without possibility of parole to some lesser sentence that might include the possibility of parole. After giving the standard Briggs instruction, the state trial court instructed the jury that it was not to consider the Governor's commutation power in reaching its verdict. Thus, the full jury instruction on commutation was as follows:

> "You are instructed that under the State Constitution, a Governor is empowered to grant a reprieve, pardon or commutation of a sentence following conviction of the crime.
>
> "Under this power, a Governor may in the future commute or modify a sentence of life imprisonment without the possibility of parole to a lesser sentence that would include the possibility of parole.

"So that you will have no misunderstandings relating to a sentence of life without possibility of parole, you have been informed generally as to the Governor's commutation modification power. You are now instructed, however, that the matter of a Governor's commutation power is not to be considered by you in determining the punishment for this defendant.

"You may not speculate as to if or when a Governor would commute the sentence to a lesser one which includes the possibility of parole.

"I instruct you again that you are to consider only those aggravating and mitigating factors which I have already read to you in determining which punishment shall be imposed on this defendant." Respondent's Opposition to Motion to Amend Petition for Writ of Habeas Corpus in No. C89–1906 (ND Cal.), p. 7, Record, Doc. No. 267, quoting Tr. 1059–1060.

In an unrelated case, we had upheld the Briggs instruction against a federal constitutional challenge. *California* v. *Ramos*, 463 U. S. 992 (1983). On direct appeal, however, Coleman argued that giving the Briggs instruction in his case was reversible error under the California Supreme Court's decision in *California* v. *Ramos*, 37 Cal. 3d 136, 689 P. 2d 430 (1984). There the California Supreme Court held, on remand from this Court, that the Briggs instruction violates the California Constitution because, in the California Supreme Court's view, it is misleading, invites the jury to consider irrelevant and speculative matters, and diverts the jury from its proper function.

The California Supreme Court rejected Coleman's argument and upheld his death sentence. *People* v. *Coleman*, *supra*. While the court found that the giving of the Briggs instruction was error under California law, it held the error was not prejudicial because the additional instruction told the jury it should not consider the possibility

of commutation in determining Coleman's sentence. *Id.*, at 104.

Coleman then sought a federal writ of habeas corpus. Although the District Court acknowledged this Court's holding that giving the Briggs instruction does not violate the Federal Constitution and does not mislead or inappropriately divert the jury, the court nonetheless granted the writ as to Coleman's death sentence. No. C89–1906 (ND Cal., Mar. 28, 1997), App. to Pet. for Cert. A–146, A–151. Relying on recent Ninth Circuit precedent, the District Court found the Briggs instruction was inaccurate as applied to Coleman because it did not mention a limitation on the Governor's power to commute Coleman's sentence. *Id.*, at A–147. Under the California Constitution, the Governor may not commute the sentence of a prisoner who, like Coleman, is a twice-convicted felon without the approval of four judges of the California Supreme Court. Cal. Const., Art. 5, § 8.

The District Court found that, because the Briggs instruction did not mention this limitation on the Governor's commutation power, it violated the Eighth and Fourteenth Amendments by "g[iving] the jury inaccurate information and potentially divert[ing] its attention from the mitigation evidence presented." No. C89–1906, *supra*, at A–151. The court also found that, in the context of the case—particularly, the prosecutor's arguments of future dangerousness, "the commutation instruction would likely have prevented the jury from giving due effect to Coleman's mitigating evidence." *Id.*, at A–149. The court did not in express terms consider the effect of the additional instruction, which instructed the jury not to consider commutation, but it noted that the Ninth Circuit had held in a similar case, *Hamilton* v. *Vasquez*, 17 F. 3d 1149 (1994), "that the trial court did not cure the error by instructing the jury not to consider commutation." No. C89–1906, *supra*, at A–148.

Per Curiam

The Court of Appeals for the Ninth Circuit affirmed the District Court's grant of the writ as to Coleman's sentence. 150 F. 3d 1105 (1998). The Court of Appeals agreed with the District Court's finding that the instruction, as applied to Coleman, gave the jury inaccurate information about the Governor's commutation power. *Id.*, at 1118. And, in a sweeping pronouncement, the court declared, "[a] commutation instruction is unconstitutional when it is inaccurate." *Ibid.* The instruction at issue was fatally flawed, the court held, because it "dramatically overstate[d] the possibility of commuting the life sentence of a person such as Coleman" (by creating "the false impression that the Governor, acting alone," could commute the sentence) and thus prevented the jurors from "understand[ing] the choice they [we]re asked to make" and "'invited [them] to speculate' that Coleman could be effectively isolated from the community only through a sentence of death." *Id.*, at 1119.

Having concluded that the giving of the instruction was constitutional error, the Court of Appeals then took up the State's argument that, even if the instruction was unconstitutional, it "did not have a 'substantial and injurious effect or influence' on the jury's sentence of death," *ibid.*, as required by *Brecht* v. *Abrahamson*, 507 U. S. 619, 637 (1993). The court explained:

> "To decide this question, we look to *Boyde v. California*, 494 U. S. 370 (1990). When the inaccuracy undermines the jury's understanding of sentencing options, 'there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.' *Boyde*, 494 U. S. at 380.
>
> "We conclude the district court did not err in holding that Coleman was denied due process by the state trial court's inaccurate commutation instruction." 150 F. 3d, at 1119 (parallel citations and other citations omitted).

Per Curiam

Though the Court of Appeals' constitutional analysis of the jury instruction, and the Circuit precedent on which it relied, have not been approved by this Court, we do not consider the validity of that analysis here because the State has not asked us to do so. We will simply assume at this stage that the instruction did not meet constitutional standards. The State does contend, however, that the Court of Appeals erred by failing to apply the harmless-error analysis of *Brecht*. We agree.

We held in *Brecht* that a federal court may grant habeas relief based on trial error only when that error "'had substantial and injurious effect or influence in determining the jury's verdict.'" 507 U. S., at 637 (quoting *Kotteakos* v. *United States*, 328 U. S. 750, 776 (1946)). This standard reflects the "presumption of finality and legality" that attaches to a conviction at the conclusion of direct review. 507 U. S., at 633. It protects the State's sovereign interest in punishing offenders and its "good-faith attempts to honor constitutional rights," *id.*, at 635, while ensuring that the extraordinary remedy of habeas corpus is available to those "'whom society has grievously wronged,'" *id.*, at 634 (quoting *Fay* v. *Noia*, 372 U. S. 391, 440–441 (1963)).

A federal court upsets this careful balance when it sets aside a state-court conviction or sentence without first determining that the error had a substantial and injurious effect on the jury's verdict. The social costs of retrial or resentencing are significant, and the attendant difficulties are acute in cases such as this one, where the original sentencing hearing took place in November 1981, some 17 years ago. No. C89–1906, *supra*, at A–101, n. 45. The State is not to be put to this arduous task based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually

prejudiced by the error. *Brecht*, *supra*, at 637. As a consequence, once the Court of Appeals determined that the giving of the Briggs instruction was constitutional error, it was bound to apply the harmless-error analysis mandated by *Brecht*.

The *Boyde* test that the Court of Appeals applied instead is not a harmless-error test at all. It is, rather, the test for determining, in the first instance, whether constitutional error occurred when the jury was given an ambiguous instruction that it might have interpreted to prevent consideration of constitutionally relevant evidence. *Boyde* v. *California*, 494 U. S. 370, 377, 380 (1990). In such cases, constitutional error exists only if "there is a reasonable likelihood" that the jury so interpreted the instruction.

Although the *Boyde* test for constitutional error, like the *Brecht* harmless-error test, furthers the "strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation," 494 U. S., at 380, it is not a substitute for the *Brecht* harmless-error test. The *Boyde* analysis does not inquire into the actual effect of the error on the jury's verdict; it merely asks whether constitutional error has occurred. If the Court of Appeals had viewed the jury instruction as ambiguous on the issue whether the Governor had the power alone to commute defendant's sentence, it might have inquired—as in *Boyde*—whether there was a reasonable likelihood that the jury understood the instruction as stating the Governor had that power. If the court found that possibility to be a reasonable one, it would determine then whether the instruction, so understood, was unconstitutional as applied to the defendant. Even if the court found a constitutional violation, however, it could not grant the writ without further inquiry. As the Court has recognized on numerous occasions, some constitutional errors do not entitle the defendant to relief, particularly

habeas relief. See, *e.g.*, *Brecht*, *supra*, at 637–638; *O'Neal* v. *McAninch*, 513 U. S. 432, 435–436 (1995) (applying harmless-error review to an instruction that "violated the Federal Constitution by misleading the jury"). The court must find that the error, in the whole context of the particular case, had a substantial and injurious effect or influence on the jury's verdict.

The motion of respondent for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted, and the judgment of the Ninth Circuit Court of Appeals is reversed; the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

ARTHUR CALDERON, WARDEN *v.*
RUSSELL COLEMAN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 98–437. Decided December 14, 1998

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG and JUSTICE BREYER join, dissenting.

Busy appellate judges sometimes write imperfect opinions. The failure adequately to explain the resolution of one issue in an opinion that answers several questions is not a matter of serious consequence if the decision is correct. In this case, there might have been a slight flaw in the Court of Appeals' brief explanation of why the invalid instruction given to the jury was not harmless, but, as I shall explain, the Court's ruling was unquestionably correct.

The State does not challenge the conclusion that the jury was given an unconstitutional instruction. It merely argues that this trial error should not "command automatic reversal . . . without application of the harmless error test of *Brecht* v. *Abrahamson*, 507 U. S. 619 (1993)."[1] And respondent Coleman does not contend that *Brecht* is inapplicable. He merely argues that the Court of Appeals actually performed the *Brecht* inquiry, albeit in an expedited fashion. Thus, the only controversy before this Court is whether the Court of Appeals was faithful to *Brecht*, and sufficiently explicit in its adherence.

Three aspects of the *Brecht* test for harmless error are significant here: (1) the test requires the reviewing judge to evaluate the error in the context of the entire record; (2)

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[1] Pet. for Cert. i.

it asks whether the constitutional trial error at issue had a "'. . . substantial and injurious effect or influence in determining the jury's verdict,'" *Brecht*, 507 U. S., at 637 (quoting *Kotteakos* v. *United States*, 328 U. S. 750, 776 (1946)); and (3) if the judge has grave doubt about whether the error was harmless, the uncertain judge should conclude that the error affected the jury's deliberations and grant relief, see *O'Neal* v. *McAninch*, 513 U. S. 432 (1995).

In this case, it is undisputed that both the District Court and the Court of Appeals made a thorough examination of the entire record. The District Court's 117-page opinion carefully analyzed each of the respondent's nonfrivolous attacks on his conviction and concluded that the judgment of guilt should stand. With respect to the death penalty, however, the District Judge decided that the inaccurate and misleading instruction describing the Governor's commutation power was unconstitutional and "would likely have prevented the jury from giving due effect to Coleman's mitigating evidence."[2] Although the judge did

[2]App. to Pet. for Cert. 149. The District Court concluded more fully:

"Coleman was entitled, under the Eighth and Fourteenth Amendments, to a sentencing jury that could fairly review the evidence he presented to show that he should not be sentenced to death. *See e.g., Boyde* [v. *California*, 494 U. S. 370, 377-378 (1990)]; *Lockett* [v. *Ohio*, 438 U. S. 586, 605 (1978)]. Considered in light of the prosecution argument, the aggravating evidence and the record as a whole, the commutation instruction would likely have prevented the jury from giving due effect to Coleman's mitigating evidence. *See Hamilton* [v. *Vasquez*, 17 F. 3d 1149, 1163 (CA9), *cert. denied*, 512 U. S. 1220 (1994)]; *cf. Boyde*, 494 U. S. at 370.

"Believing that the governor could, single-handedly, render Coleman eligible for parole, for example, the jury would have found it difficult to give 'a reasoned moral response' to testimony about Coleman's temper and his history of incarceration that was introduced to explain his behavior. *See Hamilton*, 17 F. 3d at 1160. During its deliberation, the jury requested a copy of Coleman's prior felony convictions, which [suggests] that it gave them considerable weight. RT 1068-72. Yet the

not use the exact words that this Court used in its opinions in *Kotteakos*, *Brecht*, and *O'Neal*, it is perfectly clear that he was convinced that the instruction had a "substantial and injurious effect" on the jury's deliberations. This conclusion is reinforced by the statement of a juror ex-

instruction prevented the jury from learning that Coleman's prior convictions not only weighed against him in aggravation but also made parole considerably less likely. *See* [*California* v. *Ramos*, 463 U. S. 992, 1008 (1983)] (penalty-phase jury may consider many factors in determining whether death is the appropriate punishment); *see also Penry* [v. *Lynaugh*, 492 U. S. 302, 324 (1989)] (penalty-phase instruction unconstitutionally allowed jury to give aggravating, but not mitigating, effect to evidence of petitioner's mental retardation).

"The need for accurate parole-related instructions is heightened when the prosecution argues the issue of a defendant's future dangerousness. *See Simmons* [v. *South Carolina*, 512 U. S. 154, 164 (1994)] (due process violated when trial court refused to give accurate parole-eligibility instruction to rebut prosecution's argument about future dangerousness). Here, the prosecutor built his penalty-phase case around Coleman's prior felonies and his propensity for violence, both in and out of prison. His closing argument, in particular, told the jury that Coleman 'has already demonstrated what he is capable of doing on numerous occasions to each and every one of us. . . . He is manipulative, he is dangerous to all of us.' RT 1011-12, 1029-30; *see Simmons*, [512 U. S., at 157] (prosecutor alluded to future dangerousness by arguing that death sentence would be 'a response of society to someone who is a threat[']); *Hamilton*, 17 F. 3d at 1162 (prosecutor argued that [Hamilton] would be 'conniving and devising ways to manipulate the system and get out[']). This argument may have caused the jury to speculate about the possibility that Coleman would be released if he were not sentenced to death.

"Because the instruction, in the context of Coleman's penalty-phase proceeding, gave the jury inaccurate information and potentially diverted its attention from the mitigation evidence presented, his death sentence violates the Eighth and Fourteenth Amendments: 'The jury in this case deliberating under these instructions could not have made the constitutionally mandated reasoned and informed choice between a sentence of life imprisonment without possibility of parole and a sentence of death.' *See Hamilton*, 17 F. 3d at 1164." *Id.*, at 149–151 (footnote omitted).

plaining how the invalid instruction had, in fact, affected the jury's deliberations.[3]

Because there is no reason to believe that the District Court's evaluation of the impact of the invalid instruction was incorrect, it is not surprising that the Court of Appeals affirmed without writing extensively about the harmless-error issue. It reasoned, in brief, that if there was a reasonable likelihood that the jury had applied an invalid instruction in a way that prevented the consideration of constitutionally relevant evidence, the error necessarily satisfied the *Brecht* test. Instead of spelling out its reasoning at length, it merely cited an earlier en banc decision of the Ninth Circuit that came to a similar conclusion. See *McDowell* v. *Calderon*, 130 F. 3d 833, 838 (1997), cert. denied, 523 U. S. __ (1998).[4]

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[3]"[A]ccording to juror Verda New, the possibility of parole was a much discussed topic in deciding whether respondent should live or die: '[The jurors] openly discussed that Russell Coleman would be released from prison unless we sentenced him to death. Several jurors stated that he could be paroled if we sentenced him to life in prison. . . . Many of the jurors expressed their fear that if we failed to sentence Mr. Coleman to death, the courts or the Governor could allow him to be released from prison. This was the most significant part of our discussions regarding the appropriate penalty.'" Brief in Opposition 7.

[4]Although this Court's *per curiam* opinion quotes the relevant paragraph from the opinion below, see *ante*, at 4, the Court inadvertently omits the citation to *McDowell* that explained the Court of Appeals' reasoning. In *McDowell*, the en banc court stated:

"The question, then, is whether this fundamental error had any 'substantial and injurious effect or influence' on the jury's sentence of death, *Brecht* v. *Abrahamson*, 507 U. S. 619, 637 (1993) (quoting *Kotteakos* v. *United States*, 328 U. S. 750, 776 (1946)). To answer this question, we look for specific guidance to *Boyde* v. *California*, 494 U. S. 370 (1990). In *Boyde*, the Supreme Court confronted a claim that an arguably ambiguous jury instruction 'restrict[ed] impermissibly a jury's consideration of relevant [penalty phase] evidence. . . .' To evaluate such a claim, the Court fashioned a reviewing yardstick which we find appropriate here: 'The proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents consideration of constitutionally relevant evidence.' *Id.* at 380. If the answer is 'yes,' the error necessarily satisfies the *Brecht* test for substantial and injurious error. . . . We conclude on these facts, in these circumstances, and in the light of controlling authority that the error did substantially injure and influence the jury's verdict." *McDowell* v. *Calderon*, 130 F. 3d, at 838 (footnote omitted).

Four judges dissented from *McDowell*'s conclusion that it was reasonably likely that the jury erred in their application of an instruction used in that case, see *id.*, at 841, but no judge took issue with the logic of the harmless-error analysis quoted above, see *id.*, at 842–843 (Thompson, J., dissenting); see also *id.*, at 843–845 (Kozinski, J., dissenting).

Perhaps there may be cases in which a more detailed and written analysis of the harmless error issue should precede an appellate court's decision to affirm a trial court's conclusion that an unconstitutional jury instruction in a capital sentencing proceeding was not harmless. But even if that be true, there are three good reasons for not requiring the Court of Appeals to take a second look at the issue in this case.

First, in the context of the entire record as analyzed by the District Court, the result here is correct. Second, a fair reading of the Chief Justice's opinion for the Court in *Boyde* v. *California*, 494 U. S. 370 (1990), indicates that the heightened "reasonable likelihood" standard endorsed in that case was intended to determine whether an instructional error "require[s] reversal." *Id.*, at 379, 380. There is little reason to question the soundness—at least in most applications—of the reasoning of the en banc opinion in *McDowell* on which the Court of Appeals relied in this case. Third, there is a strong interest in bringing all litigation, and especially capital cases, to a prompt conclusion. This Court's ill-conceived summary disposition will needlessly prolong this proceeding.

Whatever the shortcomings of the Court of Appeals' review, they surely are not so great as to warrant an expenditure of this Court's time and resources. This is especially so because our decision today is unlikely to change the result below. Ordinarily, we demand far more indication that a lower court has departed from settled law, or has reached an issue of some national significance, before we grant review. The purported error in this case does not satisfy that standard.

Accordingly, I would deny the petition for writ of certiorari and, therefore, respectfully dissent.